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ABSTRACT

This booklet summarizes the proceedings of a forum--whose audience consisted of over 200 library and information managers, congressional staff members, and persons from the information industry and academic community--on the condition of federal information policies as they relate to the Congressional initiative. Among issues discussed are: (1) the role of Congress in formulating information policies, and how that role is balanced by the executive and judicial branches; (2) the practicality and desirability of centralized control over the dissemination of government information; and (3) the inhibiting impact of the costs of acquiring information in electronic formats on access to that information. Speakers whose remarks are summarized are: Congressman Robert E. Wise, Jr., (Democrat--West Virginia); Harold C. Relyea, Congressional Research Service (CRS); Ralph Nader, consumer advocate; Walter Berns, Georgetown University and American Enterprise Institute for Public Policy Research; John H. Gibbons, Office of Technology Assessment (OTA); Nancy Kranich, New York University Libraries; Susan K. Martin, U.S. National Commission on Libraries and Information Science (NCLIS); Robert M. Rosenzweig, Association of American Universities; and Anthony G. Oettinger, Harvard University. Three presentations are also included in full text: (1) "Keynote Address" (Robert E. Wise, Jr.); (2) "Congressional and Federal Information Policies: The Bicentennial Record and the Future" (Harold C. Relyea); and (3) "Scholarship and the Need for Information" (Robert M. Rosenzweig). (SD)

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# FLICC

Federal Library & Information Center Committee

# FEDERAL INFORMATION POLICIES

## The Congressional Initiative

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*Forum on Federal Information Policies:*

# The Congressional Initiative

The sixth annual forum
held March 22, 1989
at the
Library of Congress,
Washington, D.C.

A Summary of Proceedings
Written by Douglas Price

Federal Library and Information Center Committee
Library of Congress
Washington 1989

# About FLICC

The Federal Library and Information Center Committee (FLICC) was created in 1965 as the Federal Library Committee by joint action of the Library of Congress and the Bureau of the Budget (currently the Office of Management and Budget). FLICC's purpose is to achieve better utilization of federal library and information center resources and facilities through professional development, promotion of services, and coordination of available resources.

FLICC is also responsible for making recommendations on federal library and information policies, programs, and procedures to federal agencies and to others concerned with libraries and information centers.

FLICC's network component , the Federal Library and Information Center Network (FEDLINK) was established in 1978 to allow federal libraries to participate in the Online Computer Library Center (OCLC). Using FLICC/FEDLINK service contracts, federal libraries, information centers, and other offices obtain services directly from commercial sources. These contracts usually provide substantial discounts not available to individual customers. For both large- and small-volume users, this approach secures favorable terms assuring lower costs.

In addition to providing cost-effective library bibliographic services and other library services and products for member libraries and information centers, the network has functioned as a center for evaluating new library technologies.

For further information about our services, write Mary Berghaus Levering, Acting Executive Director, FLICC, Library of Congress, Washington, DC 20540, or telephone (202) 707-6055.

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Christina Zirps coordinated the 1989 forum for the FLICC Office.

Catherine Ann Jones coordinated the forum
on behalf of the FLICC Education Working Group.

Proceedings edited and designed by
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## *Biographical Sketches of the Speakers*

**The Honorable Robert E. Wise, Jr.,** (D-W.Va.), chairs the House Subcommittee on Government Information, Justice, and Agriculture. The fourth-term congressman also serves on the Budget Committee, the Government Operations Committee, and the Select Committee on Aging. He was elected to the House of Representatives on November 2, 1982. He served in the West Virginia Senate (1980-82). He was director of West Virginians for Fair and Equitable Assessment of Taxes, Inc. (1977-80) and legislative counsel to the Judiciary Committee of the West Virginia House of Delegates (1977-78). He was graduated from the Tulane University College of Law, New Orleans (1975), and Duke University, Durham, North Carolina (A.B., 1970).

**Catherine A. Jones** has been chief of the Congressional Reference Division, Congressional Research Service (CRS), Library of Congress, since 1978. With advanced degrees in library science (M.S.L.S., Catholic University of America, 1969) and government (M.A., George Washington University, 1980), she has been an adjunct professor at the Catholic University of America for several years. Her career as a librarian has included positions with the Executive Office of the President, Office of Management and Budget (1968-73); George Washington University Library (1973-78); and the Washington Office of the American Library Association (1973-74). She is treasurer of the Special Libraries Association.

**Harold C. Relyea** is a specialist in American National Government, Congressional Research Service (CRS), at the Library of Congress. Since joining CRS in 1971, he has produced a number of major studies for Congress, including analyses of government information policy and practice. The author of more than 75 articles and, among other books, *Freedom of Information Trends in the Information Age* (Frank Cass, London, 1983), his writing on government information policy has been cited in the United States, Australia, Canada, Japan, and Western Europe. Dr. Relyea is working on *Silencing Science: National Security Controls on Scientific Communication* for Rutgers University Press. He serves on the boards of editors for several publications, including the *Journal of Media Law and Practice*, and he is on the advisory council of the International Freedom of Information Institute in Toronto. *The Economist* of London has de-

scribed Dr. Relyea as "the expert's expert on freedom of information." He was graduated from Drew University, Madison, New Jersey (A.B., 1966) and American University, Washington, D.C. (Ph.D., 1971).

**Ralph Nader** advocates in Washington for environmental and major consumer-protection legislation, including 1974 amendments to the Freedom of Information Act. His numerous publications include "Working on the System: A Manual for Citizens' Access to Federal Agencies" (1972). He was graduated from the Woodrow Wilson School of Public and International Affairs, Princeton University (A.B., magna cum laude) and Harvard University Law School (LL.B.). He was admitted to the Bar of Connecticut in 1958, the Bar of Massachusetts in 1959, and the U.S. Supreme Court Bar in 1963.

**Walter Berns** became the John M. Olin University Professor at Georgetown University in 1986 and is an adjunct scholar at the American Enterprise Institute in Washington, D.C. He also is director of the Institute for Educational Affairs in Washington, D.C., and a member of the Judicial Fellows Commission. He has been a member of the National Council on the Humanities and an alternate U.S. representative to the United Nations Commission on Human Rights. Dr. Berns was a consultant to the U.S. Department of State from 1983-87. The author of eight books and dozens of articles, including book reviews for several law journals, he has written extensively about constitutional issues, including the First Amendment. He attended Reed College, Portland, Oregon; the London School of Economics and Political Science; and the University of Chicago (M.A., 1951, and Ph.D., 1953).

**Bernadine E. Abbott Hoduski** is a professional staff member with the Joint Committee on Printing of the United States Congress. She has worked in federal, academic, and public libraries, and she established a library for the Environmental Protection Agency (EPA) in the Kansas City region in 1970. Ms. Hoduski organized the Government Documents Round Table of the American Library Association and served as its first coordinator. She chaired an Ad Hoc Committee on Depository Library Access to Federal Automated Data Bases, which recommended to the Congress that depository libraries receive government information in electronic format. She also chairs the International Federation of Library Associations and Institutions Section on Government Information. Ms. Hoduski was graduated from Avila College, Kansas City, Missouri (B.A., history, 1959), and the University of Denver, Colorado (M.A., library science, 1965).

**John H. Gibbons** directs the Office of Technology Assessment (OTA), which serves as the "technology think tank" of the Congress. OTA has completed recent studies on the future of federal electronic printing; disseminating federal information in an electronic age; defending secrets and sharing data; science, technology, and the constitution in the information age; and commercial newsgathering from space. Dr. Gibbons was appointed OTA director in 1979. He earned a Ph.D. in physics at Duke University in 1954, worked as a research physicist at the Oak Ridge National Laboratory for 19 years, organized the federal government's first energy conservation activities in 1973, and has served national advisory groups concerned with energy and environmental issues.

**Nancy Kranich** is director of Public and Administrative Services at New York University Libraries. She chairs the Coalition on Government Information, and she chaired the American Library Association (ALA) ad hoc committee that formed that coalition of 50 not-for-profit groups concerned about First Amendment and information-access issues. Ms. Kranich is a member of the ALA Council and has served as chair of the Association of College and Research Libraries Legislation Committee and the ALA Legislation Assembly. She was graduated from New York University, Graduate School of Public Administration (M.P.A.), and the University of Wisconsin (B.A., anthropology, and M.A., library science).

**Susan K. Martin** became the executive director of the U.S. National Commission on Libraries and Information Science (NCLIS) in 1988. She was director of the Milton S. Eisenhower Library at the Johns Hopkins University (1979-88); head of the Library Systems Office for the University of California, Berkeley (1973-79); and systems librarian for Harvard University Library (1965-73). Memberships in numerous professional organizations include the American Library Association Council. Dr. Martin was graduated from Tufts University, Medford, Massachusetts (B.A., cum laude, romance languages, 1963); Simmons College, Boston (M.S., library science, 1965); and the University of California, Berkeley, School of Library and Information Studies (Ph.D., 1983).

**Robert M. Rosenzweig** became president of the Association of American Universities in 1983. At Stanford University from 1962 to 1983, his positions included vice president for public affairs (1974-83), political science lecturer (1963-82), and vice-provost and advisor to the president (1971-74). From 1958-62, he was with the U.S. Office of Education. Dr. Rosenzweig served the Association of Independent California Colleges

and Universities as president from 1980-82; the American Enterprise Institute as adjunct scholar in 1983; and the American Society of Neurological Surgeons as Cushing Orator in 1984. The author of two books and several articles, he has written about the role of the university in subsidizing research. He was graduated from the University of Michigan (B.A., 1952, and M.A., 1953) and Yale University (Ph.D., political science, 1956).

**Anthony G. Oettinger** chairs the Program on Information Resources Policy and the Center for Information Policy Research at Harvard University, where he also is the Gordon McKay Professor of Applied Mathematics, Professor of Information Resources Policy, and a member of the Faculty of Government. He is a consultant to the President's Foreign Intelligence Advisory Board and a member of the Board of Visitors of the Defense Intelligence College, the Scientific Advisory Group of the Defense Communications Agency, and the Council on Foreign Relations. He is a Fellow of the American Academy of Arts and Sciences. The author of numerous papers on information technologies, Dr. Oettinger also wrote *Automatic Language Translation: Lexical and Technical Aspects.*

# *Introduction*

*"Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day."*

—Thomas Jefferson, 1816

The year 1989 marks the bicentennial of the Congress of the United States—a Congress which, from its fledgling days, remains committed to keeping the people informed.

The Congress of 200 years ago could not have foreseen today's information age, when millions of facts are electronically dispatched daily throughout the nation and the world, and when the United States has become the world's largest publisher.

This celebration year offers a fitting opportunity for both a retrospective examination and forecast of the congressional role in the formulation of information policies.

**The past as prologue:** A brief chronology of landmark information legislation includes:

- 1789–Congress proposes the First Amendment to protect a free press;
- 1790–Congress passes the first copyright law;
- 1800–Congress authorizes the expenditure of $5,000 for its library, the Library of Congress;
- 1870–Congress gives the Librarian of Congress control of copyrights, enabling the Library of Congress to become the largest depository library in the world;
- 1895–The Printing Act creates the Joint Committee on Printing, consolidating all government printing at the Government Printing Office, and requiring distribution of government documents to state and territorial libraries;
- 1962–Depository Library Act specifies system for disseminating federal information;
- 1966–Freedom of Information Act enhances access to government records;
- 1980–The Paperwork Reduction Act gives the Office of Management and Budget broad responsibility for federal paperwork management.

In addition, dozens of other laws establish national clearinghouses of information and compel federal agencies to disseminate information on subjects ranging from crop reports to drug and alcohol abuse.

Granted, new technologies have outpaced legislation geared to printing presses. No longer is there a central source of federal information as there was in 1895, when the Congress instructed the Public Printer to bind copies of House and Senate reports and documents "in full sheep" and distribute them to libraries and depositories in the states and territories. Today, federal information is proliferating at hundreds of federal agencies in a variety of electronic formats relatively easy to produce but expensive for depository libraries and the public to acquire. Private industry is vying for the right to publish federal information in electronic formats, raising issues of production costs, privatization, and government competition.

The Office of Technology Assessment concluded in a recent study that "congressional action is urgently needed to resolve federal information dissemination issues and to set the direction of federal activities for years to come."

What is the role of Congress in formulating a single information policy, or several policies, and how is that role balanced by the executive and judicial branches of the government? Is centralized control over the dissemination of government information practical or desirable? Will the cost of acquiring information in electronic formats inhibit access for some?

These and related issues were addressed at the sixth annual Forum on Federal Information Policies: "The Congressional Initiative," sponsored by the Federal Library and Information Center Committee (FLICC) on March 22, 1989, in the Mumford Room of the James Madison Memorial Building, Library of Congress.

FLICC was established in 1965 (as the Federal Library Committee) to provide leadership in addressing policy issues that affect the dissemination of information to government employees and the general public. In line with this mandate, FLICC has arranged for these forums, which have become an annual status report on information access and dissemination policy.

*Forum on Federal Information Policies: The Congressional Initiative*

# *Introductory Remarks*

The Federal Library and Information Center Committee (FLICC), in observance of the 200th anniversary of the United States Congress in 1989, chose "The Congressional Initiative" as the topic of its sixth annual Forum on Federal Information Policies. The forum took place in the James Madison Memorial Building of the Library of Congress (LC) on March 22, 1989.

Among those in an audience of more than 200 were library and information center managers, congressional staff members, and persons from the information industry and academic community.

## Ruth Ann Stewart

Ruth Ann Stewart, assistant librarian for national programs, Library of Congress, opened the session by welcoming guests and participants. She noted that it seemed appropriate for federal libraries and information centers, as "creations of the Congress and conduits of federal information," to join with the Library of Congress in celebrating the bicentennial of the Congress by examining the historical and future roles of Congress in guiding information policies. She also noted the recent retirement of longtime FLICC executive director, James P. Riley. She introduced Mary Berghaus Levering, chief, Network Division, National Library Service for the Blind and Physically Handicapped, Library of Congress, who will serve as the interim executive director of FLICC.

## Donald C. Curran

The Associate Librarian of Congress, Donald C. Curran, also welcomed those attending the forum and called attention to the comprehensive program of exhibits, symposia, and other special events that the Library of Congress has planned for the bicentennial of the Congress. He then introduced the keynote speaker, Congressman Robert E. Wise, Jr. (D-W.Va.).

# *The Congressional Perspective*

## Congressman Robert E. Wise, Jr.

In addition to chairing the House Subcommittee on Government Information, Justice, and Agriculture, Wise also serves on the Budget Committee, the Government Operations Committee, and the Select Committee on the Aging.

The fourth-term congressman said that although he had been chair of the House Subcommittee on Government Information, Justice, and Agriculture for only a few weeks, he was no stranger to federal information laws. As a public-interest lawyer, he said, he had found the Freedom of Information Act (FOIA) to be invaluable in obtaining necessary information from government agencies. He said he still has a user's perspective, which he thinks will be of value in helping to bring the average citizen's viewpoint to information policy formulation.

Wise said two questions posed in a forum issue statement illustrate that Congress does not operate in a vacuum: "What is the role of Congress in formulating a single information policy, or policies, and how is that role balanced by the executive and judicial branches of the government?" Congress can establish policies and enact laws, he said, but the President is responsible for enforcing them and the courts must give meaning to the words.

As an example, he said, the First Amendment to the Constitution—guaranteeing free speech, free press, free exercise of religion, and the right of assembly—has not changed since it was proposed by Congress in 1789 and ratified by the states as a part of the Bill of Rights. Yet, Wise said, there is by now a substantial body of First Amendment law (enough to keep many lawyers and scholars busy), all derived from judicial opinions and legal interpretations of a few words initiated by the Congress in 1789.

A more complex example of the interrelationship among the three branches of the federal government is the Freedom of Information Act (FOIA). After an 11-year struggle, Congress passed FOIA in 1966 and President Johnson signed it over the objections of almost every federal agency, Wise said.

"The original FOIA was well-intentioned, but poorly drafted," Wise said. FOIA exemptions were too broad, specific procedures and time limits for agency responses to information requests were lacking, and

provisions for judicial review were limited. As a result, he continued, hostile agencies "made mincemeat of the FOIA" using delay, evasion, and bureaucratic procedures to withhold every document they could. At that point, FOIA could have been called a failure, Wise said.

However, he continued, the story did not end there. After several years of investigations and hearings, in 1974 Congress sent President Gerald Ford a major package of amendments. Agencies hostile to FOIA talked the President into a veto. But in a vote to override the veto, Congress sent the agencies a message that further executive branch resistance to disclosing government documents would not be tolerated.

The FOIA amendments of 1974 narrowed exemptions from the act, established firm time limits for agency responses to requests for information, spelled out procedures, and most important, provided for meaningful judicial review, Wise said. For the first time, he added, FOIA became an effective tool for the disclosure of information.

As the public learned that FOIA was useful in obtaining government information, requests to agencies for federal documents increased to the point of exceeding the ability of some agencies to respond. However, at least then delays could be attributed to the volume of requests, not to bureaucratic inertia.

Most significant, Wise said, was that with meaningful judicial review available, information seekers who took their cases to court found judges willing "to give more meaning to the spirit behind the FOIA." Wise acknowledged that although the 1974 amendments to FOIA were far from perfect, Congress, with assistance from the courts and a strong public demand, has produced a change in the attitude of executive branch agencies, which on the whole, finally agreed to take the law seriously. Many established formal FOIA offices staffed by civil-service professionals, who set about implementing the law efficiently.

Wise acknowledged that the success of FOIA is not uniform throughout the government. Although some agencies, even large ones, have achieved 98 percent compliance, others may delay responding to information requests for months because of management inattention and lack of resources. Nevertheless, Wise said, the history of FOIA demonstrates how each of the three branches of government plays a role in the policy formulation process.

FOIA provides an obvious lesson, Wise said, in dealing with the challenges of the age of electronic information. With the mechanisms of the federal information dissemination process out of date and the federal government becoming more and more computerized, there is a great need to update our information laws, which were formulated when hard copy was the only medium available.

To ensure broad disclosure of government information, Wise said, some have spoken of the need for an electronic freedom of information act. He said he supports the idea of an electronic FOIA, but warns of difficulties in legislating in uncharted areas.

For the future, he recommended a more cooperative approach with the executive branch in addressing electronic information issues and said he is optimistic that such an approach can succeed.

Although he did not suggest a time frame on the process, Wise said he is confident that Congress, after more preliminary work, can take the lead in framing an electronic FOIA.

# *The Historical Perspective*

## Harold C. Relyea

The moderator of the morning session, Catherine A. Jones, chief, Congressional Reference Division, Congressional Research Service (CRS), Library of Congress, observed that as the government—the nation's largest publisher—shifts into the age of electronic information dissemination, new questions will challenge the Congress.

She introduced Harold C. Relyea, specialist, American National Government, CRS. Relyea discussed, from a historical perspective, the role of Congress in formulating information policies. He based his remarks on a paper, "Congressional and Federal Information Policies: The Bicentennial Record and the Future," which he had prepared for the forum.

Relyea said that a meaningful historical account of the role of Congress in formulating information policies could not be accomplished with a simple linear portrayal of events. He therefore organized his paper according to clusters of developments related by common policy significance—the constitutional context, the publication foundation, accountability and administrative considerations, national security struggles, personal and institutional confidentiality protections, and the role of Congress in shaping future information policies. But because of time constraints, Relyea limited his forum presentation to highlights of policy development other than the constitutional context and future information policies.

Relyea opened his discussion with a quotation from former President Woodrow Wilson, who said in *Congressional Government*, a book he wrote as a graduate student, that "The informing function of Congress should be preferred even to its legislative function." What Wilson had in mind was what is now called "oversight," Relyea said. He quoted another President-to-be, Representative James Garfield, who wrote in 1877 that Congress is "... the appointed place where the nation seeks to air its thoughts and register its will." In realizing its informing function, Congress will continue to provide for oversight and open debate, Relyea said.

**Publication foundation:** Relyea reviewed major legislation that provides a publication foundation for the "informing function" of Congress. The first Congress of 1789 responded to concerns expressed

during the Constitutional Convention of 1787 and quickly provided for the printing and distribution of laws and treaties, the preservation of official state papers, and the maintenance of official files in the new departments. Congress authorized the printing of Senate and House journals in 1813. Beginning in 1824, Congress authorized the printing and distribution of floor proceedings, establishing a foundation for eventual publication of the *Congressional Record* in 1873.

The use of contract printers for the considerable volume of printing left room for political abuse, Relyea said, so in 1860, Congress established the Government Printing Office (GPO). The Printing Act of 1895, which established much of the basic policy still found in Title 44 of the U.S. Code, gave GPO government-wide printing responsibility.

Relyea identified some of the other significant actions Congress took over the years relating to information publication, such as the passage of the copyright and patent statutes in 1790 and the beginning of the depository library program in 1813. Institutions founded to improve information flow include the Library of Congress (1800), the National Agricultural Library (1862), the National Archives (1934), the National Technical Information Service (1950), and federal information centers (1978).

**Oversight function:** The oversight function of Congress became more critical in the twentieth century, when the federal government entered a new phase with "the rise of the administrative state," Relyea said. The growing Progressive Movement sought greater government intervention into and regulation of various sectors of American society. With entry of the United States into World War I, regulatory activities expanded even further. These activities were reduced after the war, Relyea said, but with the onset of the Great Depression and the introduction of the New Deal, the number and variety of controlling directives, regulations, and agencies resulted in near chaos in the executive branch.

**Agency accountability:** To address the problem of accountability in the executive branch, Relyea said, Congress created an executive branch gazette during World War I and in 1935 authorized publication of the *Federal Register*. In 1937, Congress inaugurated a supplement, the *Code of Federal Regulations*. The *United States Government Manual* followed in 1939 and the *Public Papers of the Presidents* in 1960.

However, Relyea said, these publications addressed only part of the accountability problem. The Administrative Procedure Act of 1946 established a uniform procedure for the promulgation of agency regulations. Relyea noted that this statute included an important public information provision directing agencies to publish in the *Federal Register* "the established places at which, and methods whereby, the public may

secure information or make submittals of requests." However, he said, discretionary allowances for protecting information were so broad that agencies transformed what had been a "public information mandate into a basis for administrative secrecy."

The public and Congress became increasingly unhappy with bureaucratic secrecy, Relyea said, and this unhappiness led Congress to pass the Freedom of Information Act (FOIA) in 1966. The FOIA established the presumptive right of public access to department and agency records, specified nine exemptions, and provided for court resolution of disputes over the availability of requested materials. This act became the model for three laws: the Privacy Act of 1974, which allows Americans access to federal agency records on themselves; the Federal Advisory Committee Act of 1972, which opened advisory committee meetings to the public; and the Government in the Sunshine Act of 1976, which established that certain policy-making deliberations will be open to the public unless closed in accordance with specific exemptions.

**National security struggle:** Historically, Relyea said, Congress has been wary of government propaganda and censorship efforts. Even in wartime, Congress has been reluctant to fund propaganda efforts fully, and in peacetime, it has restricted government propaganda activities and indicated its opposition to widespread use of secrecy agreements.

Congress did provide for the criminal punishment of those convicted of espionage during World War I, but it did not sanction information secrecy practices of the armed services. Congress also legislated information security arrangements to protect atomic energy data, intelligence sources and methods, and patent applications affecting national security. Nonetheless, Relyea said, for some 30 years, Congress "successfully encouraged and pressured presidents from Eisenhower to Reagan to narrow classification criteria and limit discretionary authority to classify."

However, the Reagan administration reversed this historical trend. In 1982, an executive order expanded the categories of classifiable information and the authority for classifying information. In 1983, a national security decision directive (NSDD 84) required that:

- as a condition of access to classified information, all "present and future" executive branch employees, plus contractors and grantees as well, must sign agreements to not disclose classified information;
- agency personnel, contractors, and grantees outside of the intelligence community having access to so-called "sensitive compartmented information" (SCI) must submit all of their public writings for prepublication review by government officials; this requirement was to be binding on signatories for the rest of their lives, regardless of whether they

continued to have access to SCI;

- those with access to classified information must submit to polygraph examinations in investigations of unauthorized disclosures; and
- departments and agencies must adopt policies and procedures to govern contacts between media representatives and executive branch employees in order "to reduce the opportunity for negligent or deliberate disclosures of classified information."

In response to protests against the breadth and enforcement demands of the national security directive, Congress moved quickly to hold hearings. Congress eventually linked temporary moratoriums on polygraph testing and prepublication review to authorization of agency funds. The administration discontinued implementation of NSDD 84, but substituted an older secrecy contract used by the intelligence services, Relyea said. Again, Congress responded by including in appropriation legislation a prohibition against using appropriated funds to implement or enforce the secrecy agreements. This restriction came under a constitutional challenge and is currently before the U.S. Supreme Court.

**Confidentiality:** "Individual privacy, the wish not to be intruded upon, probably predates recorded history," Relyea said. Certainly, privacy was one of the natural rights which the founding fathers sought to preserve in drafting the Bill of Rights, Relyea added. Through the years, Congress has legislated prohibitions on the disclosure of personal information acquired by the government through income tax returns, census data, and other government activities.

The Privacy Act of 1974 prohibits government agencies from collecting some kinds of personally identifiable information and "allows American citizens to gain access to and make supplemental corrections of a great many records on them which are in the agency files," Relyea said. The passage of this act, Relyea said, amounts to a confession that much control over personal information has been lost in the face of technological encroachment. "Traditional expectations of privacy have been diminished and replaced by expectations of record accuracy," he said.

Relyea said that, over the years, many members of Congress have agreed with Thomas Jefferson that while they should not be precipitous, institutions must change to keep pace with times. There is much more interest in information now than when the House Subcommittee on Government Information was formed in 1955, he said.

Relyea closed with the observation that Congress well understands the significance of information for its own endeavors, but more important, Congress at large has kept sight of another cherished value, that "information is the currency of democracy."

# *Inaccessible Information*

## Ralph Nader

Jones introduced two respondents to the Relyea paper, Ralph Nader, a lawyer and consumer advocate, and Walter Berns, a professor at Georgetown University and adjunct scholar, American Enterprise Institute. Nader charged that government information is becoming less accessible, and Berns suggested that the Freedom of Information Act should apply to Congress as well as to executive branch agencies.

Nader began with an anecdote about an early experience in seeking congressional information, which, perhaps, ultimately directed him toward a career in consumer advocacy. He was in junior high school when he first discovered piles of the *Congressional Record* in a library closet, and from that time on, throughout high school and college, he has asked senators for copies of congressional hearings and reports.

"My favorite senator for that, because he responded so quickly, was Senator Prescott Bush (R-Conn.), whose son (George) has since gone on to higher office," Nader said. "I would ask for hearings that were 10 years old, and I would get them from Congress—free."

Nader discussed the usefulness of the Freedom of Information Act (FOIA), which he said is "only enforceable by the citizenry, really." The FOIA is one of the few laws that "can trigger not only attorney fees for the prevailing party against the government agency, but can also trigger a sanction for the offending official" who exceeds reasonable bounds in withholding government information.

However, the outlook for the availability of government information is not very good at all, Nader said. Restrictive fees and guidelines have been imposed for FOIA requests, and the Reagan administration attempted to get Congress to amend the statute to severely limit access to government and industry information.

He mentioned other constraints on the availability of government information. Recently, he said, there has been a "constriction [on agencies] of the collection of important information" and "increased difficulty in accessing [government information], particularly electronic databases." In the past decade, there have been sharp price increases for government publications, expansion of trade secrecy exemptions, and a great broadening of national security definitions and restrictions, in-

cluding the "notorious" confidentiality agreements that executive branch employees have been required to sign. These are not auspicious signs, Nader argued, at a time when the need for information—"friendly information"—is at an all-time high.

Government agencies are producing fewer publications and charging more for them, according to Nader. As the result of Office of Management and Budget (OMB) action, 3,800 consumer publications have been eliminated or consolidated, Nader said. Popular publications have been canceled or suspended at the departments of Agriculture, Transportation, and Energy, he said, and the prices of publications that have been retained have increased sharply.

Getting published information from Congress also has become more difficult, according to Nader. Congress has reduced print runs of hearing records and reports so that persons requesting published information from members of Congress are referred to the Government Printing Office (GPO), "where they must pay a very high price," Nader said. The cost of a subscription to the *Congressional Record* has climbed from $45 a year in 1975 to $225 a year at present. Congress also is frequently late in publishing records of some hearings, Nader said. For example, hearing records on the proposed appointment of then U.S. Appellate Court Judge Robert H. Bork to the U.S. Supreme Court were not available as of December 1988, more than a year after the hearings were conducted, he charged.

Nader also criticized OMB restrictions on agency collection of data through surveys. "They have, in my opinion, misused the Paperwork Reduction Act as a mode to curtail the collection of data in areas that businesses do not desire information to be collected," Nader said. Agencies, for example the Consumer Product Safety Commission, are required to obtain data for precise economic analyses before they can issue any new rules or regulations. Yet, the Paperwork Reduction Act imposes strict limits on the amount of data that agencies can collect. He quoted a government employee to the effect that, "Coming up with sophisticated analyses based on sparse data is like building a skyscraper on a foundation of toothpicks."

Nader also mentioned the effect of privatization on the availability of government information. The Reagan administration has contracted out the management of many government libraries to the private sector, Nader said, and there have been serious administration proposals to transfer the National Weather Service and the National Technical Information Service to private ownership. The increased privatization of electronic databases has increased the difficulty of accessing them and

has put one more barrier between the citizen and the government, Nader said.

As an example of how privatization affects information access, persons wishing timely information from the Securities and Exchange Commission (SEC), which until last year provided open access to materials, now have two choices. For immediate information, they can pay "substantial fees" to Bechtel Group, Inc., which has a contract with the SEC to supply reproductions of SEC microfiche files, or they can wait two weeks for SEC personnel to provide free copies. Similar privatization has taken place at the U.S. Claims Court, the Federal Communications Commission, and the Interstate Commerce Commission, Nader said.

Except for libraries, the American public has accepted these trends with hardly a squeak of protest—even though the right-to-know is one of the foundations of democratic systems, Nader said. This apparent lack of concern suggests that the right-to-know ethic is not very deeply embedded in the American pysche—at least not to the extent that the public protests by mail or questions political candidates on information access issues, Nader said.

The lessons of history demonstrate that information allows citizens to participate in the process of government, Nader said. An informed citizenry keeps government officials on their toes. Anticipating that the public is going to examine their actions under the FOIA, government officials may choose a wiser course of action to forestall problems, Nader said. If government officials anticipate that the public is not going to find out what they are doing, there is likely to be scandal, inefficiency, waste, corruption, and indolence in government quarters, he charged.

Congress needs to hold widely publicized hearings that cover the full spectrum of information policies, Nader said. Further, Congress should develop information pursuant to a much more rigorous policy, establishing standards that not only keep up with the electronic information wave, but that take into account experiences since the Freedom of Information Act was passed in 1966.

"We have the best FOIA in the world, which might tempt us to be complacent, but by the measure of what is still being denied and the trend toward secrecy, there is still a lot of work to do," Nader said. "We have to overcome the overall dullness of the subject matter and find ways to get the younger generation to understand the ethic of information and the right-to-know, which in many ways is ethically fundamental to our whole system of democracy."

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# *Congressional Accountability*

**Walter Berns**

Walter Berns observed that, since Relyea and Nader had preempted much of the subject matter, he was left with focusing on Congress, which he said he was able to do because he is not dependent on the Congress for his salary.

Berns said that in order to fulfill its oversight function, Congress must have information on how effectively the laws are being faithfully executed by the executive branch. Then, having been informed, Congress has the duty to inform the public because the manner in which, and the extent to which, the laws are being faithfully executed are matters of concern to the public, specifically the voting public.

One way the Congress informs itself and the public is by conducting hearings, particularly televised hearings. Unfortunately, he said, hearings are sometimes used for a purpose other than to inform the public, which could then assess whether administrative agencies are executing laws satisfactorily.

As examples of abuse of the oversight function, Berns cited the McCarthy hearings on alleged un-American activities and others in which senators badgered witnesses and "senatorial courtesy" prevented or delayed intervention by other senators. More serious still, he said, were the Senate Judiciary Committee hearings on the proposed appointment of then U.S. Appellate Court Judge Robert H. Bork to the U.S. Supreme Court. Berns said the Constitution requires the Senate to give its advice and consent, not the opinion of the public, which in the Bork case the committee manufactured, manipulated, and then solicited.

To perform its legislative function, Berns said, Congress requires information about the state of the nation and what may be done to improve it. What information Congress in turn owes the public is not quite so clear. Obviously, laws and the debates surrounding their passage must be published, he said, "but what about what is said in conversation between the lawmakers and their constituents, or some of their constituents?" For example, he continued, what about the right of the public to know what goes on in conversations between lawmakers and the officials of savings and loans institutions?

Berns asserted that the Freedom of Information Act (FOIA) is not perfect. The public has a right to expect some FOIA amendments that

end the exemption of Congress from FOIA provisions, he said. If the public has a right to know what goes on in the administrative agencies and the executive branch, why doesn't the public have a right to know what goes on in the legislative branch? Why, he asked, in area after area, does the Congress of the United States exempt itself from the laws that it applies to everybody else?

In creating a government accountable to the people, the framers of the Constitution did not create government by public opinion. In fact, he said, the framers did their best to put some distance between the people and their government—as much distance as was compatible with the principle of popular or representative government. Indeed, he said, this distance was the great and underlying dispute between the Federalists and the anti-Federalists during the Constitution ratification period. He summarized their arguments by quoting former President Jimmy Carter: "The anti-Federalists wanted a government as good as the people. The Federalists wanted a government better than the people."

In closing, Berns said, "Informing the public, which the government must do, which the principle of democracy requires that the government do, can too easily become allowing the public itself to govern. Allowing the public itself to govern would not be constitutional government."

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Bernadine E. Abbott Hoduski, professional staff member, Joint Committee on Printing (JCP), moderated the afternoon session. She began with a tribute to the retiring executive director of FLICC, James P. Riley. She also expressed the committee's approval of the forum topic and conveyed "best wishes" from Senator Wendell H. Ford (D-Ky.), acting chair of the JCP.

Hoduski reported that new JCP members are, in addition to Senator Ford, Congressman Frank Annunzio (D-Ill.); Senator Ted Stevens, ranking minority member (R-Alaska); Senator Dennis DeConcini (D-Ariz.); Senator Albert Gore, Jr. (D-Tenn.); Senator Mark Hatfield (R-Oreg.); Congressman Joseph Gaydos (D-Pa.); Congressman Pat Roberts (R-Kans.); Congressman Jim Bates (D-Calif.); and Congressman Newt Gingrich (R-Ga.).

During the last session of Congress, Hoduski said, the Joint Committee on Printing adopted policies in support of electronic pilot projects for depository libraries, the procurement of compact disk-read only memory (CD-ROM) disks for government agencies, Government Printing Office (GPO) sale of electronic publications, and the release of the *Congressional Record* on tape. Already, she added, a CD-ROM disk containing the *Census of Retail Trade by Zip Code* has been released, and the Joint Committee, the Government Printing Office, the Environmental Protection Agency, and the National Library of Medicine are working on a project to release a toxic release inventory database in three formats, compact disk, microfiche, and online.

GPO has acquired a CD-ROM publishing system and is reviewing and acquiring suitable software, Hoduski said. An electronic-format task force to coordinate GPO's efforts has been established by the acting public printer, Joseph Jennifer.

The JCP has asked for several studies by the Office of Technology Assessment (OTA) and the General Accounting Office (GAO). Hoduski said the following speaker, John Gibbons, would discuss the OTA report, *Informing the Nation: Federal Information Dissemination in an Electronic Age*. The GAO reports, *Users' Current and Future Technology Needs* and *Agency Needs and Practices*, are available from GAO. A report on a GAO audit of GPO microfiche production problems is also available.

Hoduski indicated that the Joint Committee on Printing had requested funds for hearings on information issues and that hearings will be held by the Subcommittee on Procurement and Printing of the Committee on House Administration. This subcommittee is chaired by Congressman Bates.

# *Congress and Technology*

## John H. Gibbons

Hoduski introduced the first speaker of the afternoon, John H. Gibbons, director, Office of Technology Assessment (OTA). Gibbons based his presentation on the recent OTA report, *Informing the Nation: Federal Information Dissemination in an Electronic Age.*

"We are experiencing a rapidly changing technology base, which is constantly providing new options for society," Gibbons said. "The fruits of this changing technology are extraordinary: personal computers, personalized magazines, compact disks to listen to, noise-free, to your favorite music. There is no end in sight, in a technical sense, . . . in how much farther we can go in terms of developing these and other related technologies."

The other side of the coin, Gibbons added, is that advancing technologies quickly make obsolete the mechanisms of governance and institutions in both the public and private sectors. Changing technologies and information erase boundaries between disciplines, Gibbons said. "Information technology has enabled, and even driven, the integration of world economies and the elimination of boundaries of what we mean by *national* industries, or industries associated with one part of the world."

Gibbons said that the increasing sophistication and complexity of the human enterprise now require a level of information support for both public and private decisions "that is truly daunting." Our society can function only if underpinned by an extraordinarily sophisticated information system, he said.

To illustrate how the information needs of the Congress itself are growing and changing, Gibbons quoted from a recent *Carnegie Corporation Quarterly* review of a book by anthropologist Ernest Becker, who said knowledge in the late twentieth century is "strewn all over the place, with no throbbing vital center or link to decision making." In the same review, another author, Elizabeth Shore, discusses ". . . complex and intertwining problems that are sliced into manageable but trivial pieces." Congress must slice the mountains of information into manageable pieces, but in doing so it must avoid trivializing the issues, Gibbons said.

To better manage information, Congress has established some of its own mechanisms—such as OTA, the Congressional Research Service,

and the General Accounting Office—for gathering information and integrating that information into forms that would be useful in its decision-making process. Gibbons said there are continuing efforts in Congress to help members, who are already overloaded with information, "to access better the wisdom that does, in fact, reside in the land, but which for one reason or another is not accessible or usable to them."

In addition to its own business, Gibbons said, Congress is responsible for keeping governance up-to-date, promoting government operations that are productive and effective, encouraging research and innovation, and protecting private rights of all sorts in the face of changing technology. These responsibilities lead to complicated government-private sector interfaces with respect to who manages and moves information, he said.

Above all, Gibbons maintained, Congress needs to help citizens become informed and stay informed about the very thing they have created, namely government. To emphasize his point, he quoted the fourth President of the United States, James Madison, who said that "A popular government without information, or the means of acquiring it, is but a prologue to a farce or to a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

Gibbons discussed four of the issues that were raised by the OTA report:

- "Are we as a nation going to take full advantage of the new opportunities for the dissemination of federally based information?" Gibbons emphasized the importance of government information to many different users, not the least of whom are average citizens. He also mentioned advantages of electronic formats, including flexibility, ease of updating, manipulability, economy, and compaction.
- "What about our historical commitment to give highest priority of government information policy to *public access*?" He noted concerns about whether government information collection is keeping pace with information users' needs. At the same time, he said, trends toward privatization and user fees, as well as national security issues and unfair foreign competition concerns, are raising questions about limiting information access. The OTA study suggests that Congress needs to take a fresh look at how public access and open government can be maintained and strengthened while meeting some other goals, such as encouraging federal agency innovation and productivity, encouraging the private sector, and giving citizens the means to become better informed.
- "Shall we permit and encourage government-wide information

dissemination agencies [such as the Superintendent of Documents, depository libraries, and the National Technical Information Service] to fully participate in the electronic age?" Gibbons said OTA suggests a number of possibilities, including the expansion of the role of the Government Printing Office in providing electronic publication support for federal agencies and in distributing and selling electronic formats. Congress should carefully review and amend such statutes as the Printing Act of 1895, the Depository Library Act of 1962, the Freedom of Information Act of 1966, and the Paperwork Reduction Act of 1980, Gibbons said.

- "In federal agency actions to upgrade their information technology capabilities and effectiveness, what priorities should be given to information dissemination?" With $20 billion to spend each year to upgrade their information technology, federal agencies have "an enormous number of opportunities" to disseminate information beyond their agencies, Gibbons said. However, information dissemination gets rather low priority, he added.

Gibbons quoted the third President of the United States, Thomas Jefferson, to illustrate the significance of the OTA study of information issues before the nation: "If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be .... If we are to guard against ignorance and remain free, it is the responsibility of every American to be informed."

## *Coalition on Government Information*

### Nancy Kranich

The second speaker of the afternoon, Nancy Kranich, director of Public and Administrative Services at New York University Libraries, described the formation and activities of the Coalition On Government Information (COGI), established three years ago to monitor public access to government information.

Kranich said a chronology compiled by the American Library Association (ALA) over an eight-year period shows that access to government information has been curtailed as the result of administrative directives, interpretation and implementation of the Paperwork Reduction Act, recommendations of the President's Commission on Fraud and Waste in Government (Grace Commission), privatization, the increasing use of security classifications, export controls, agency budget cuts, and even "disinformation," or "perception management" campaigns. Published in an ALA document, "Less Access to Less Information by and about the U.S. Government," the statistics show that access to government information was blocked by 71 government actions from 1981-84, 116 actions in 1985-86, 78 in 1987, and 104 in 1988, Kranich said.

From the librarians' point of view, Kranich asserted, these attempts to block access to information violate every principle of intellectual freedom, confidentiality, the library bill of rights, and librarians' belief in equal and ready access to information.

Long a champion of intellectual freedom, ALA passed many a resolution in support of information access but concluded that to be effective, it would have to focus much broader public attention on the issue. To do that, ALA formed a committee, which Kranich chaired, to establish the Coalition On Government Information. Included in the coalition are the American Association for the Advancement of Science, the American Civil Liberties Union, the National Education Association, People for the American Way, and other diverse groups.

Kranich said COGI recently held its second celebration of Freedom of Information Day with an event that drew 250 persons. On that same day, COGI members were encouraged by a statement made by Vice President J. Danforth Quayle at a National Press Club function: "I know the President and I strongly concur that we want to get information out to the public. An informed public is a strength that our democratic system has."

Among their activities, COGI members have monitored government secrecy issues raised in the recent trial of Oliver North; testified at congressional hearings; filed lawsuits, such as one brought against the Federal Bureau of Investigation in response to its Library Awareness Program to determine who is using libraries; and conducted a COGI information program with forums and the preparation and distribution of papers, reports, fact sheets, a quarterly newsletter, action alerts, and media kits. The recent Freedom of Information Day observance prompted gubernatorial proclamations, awards, exhibits, and forums.

COGI's present concerns include the proposed revision of Office of Management and Budget (OMB) Circular A-130; reauthorization of the Paperwork Reduction Act due this fall; access of the public to several new electronic databases; pursuit of a lawsuit to prevent destruction of taped messages between the White House and the National Security Council; support for a bill to protect government whistle blowers; and implementation of congressional intent in allowing exemptions from Freedom of Information Act fee waivers.

Kranich said that a look at information policies today gives one the general impression of a period of great chaos. The policies of the Reagan administration pitted interest against interest and created contention between the public and private sectors, between national security and civil libertarian interests, and between competitiveness and protectionism, she said.

Kranich expressed hope that the Bush administration will support more open access to information, and she said she is pleased that the administration and the Congress have indicated they want to work with each other. With some glee, she reported that OMB has approached several COGI members to solicit their concerns and positive suggestions.

Kranich said the Congress is expected to take a more critical look at the administration and to exercise its oversight role in attending to COGI concerns. Kranich advised those with information-access concerns to address them to their congressional delegates since every committee in Congress has jurisdiction over some information issue.

Kranich requested that librarians and others "on the front line" share information about any loss of access to government information, illustrative anecdotes, and "good stories so Ralph Nader can entertain us."

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## *The White House Conference*

### Susan K. Martin

The next speaker, Susan K. Martin, executive director, National Commission on Libraries and Information Science (NCLIS), briefly discussed program activities of the commission and focused her remarks on the upcoming second White House Conference on Library and Information Services (WHCLIS).

NCLIS and the American Association of School Librarians are cosponsoring an invitational symposium on information skills and information literacy, Martin said. The purpose of the symposium is to reach consensus on the proper way to educate youngsters in this information age and to produce an action plan for teaching young people how to locate information and how to use it once it is located. There must be close conjunction between the teaching process and the information process, Martin said. It is hoped that the estimated 90 persons attending the symposium will endorse such an action plan and take it back to their respective organizations for approval and implementation. Approximately 24 educational organizations have been invited; they include the National Education Association, the American Federation of Teachers, and associations of school principals and administrators.

NCLIS also is helping the National Center for Education Statistics to establish a systematic method for collecting public library statistics, Martin said. Some statistics have been collected, but never on a systematic basis. These statistics have been forwarded to state library agencies and "stuck there," she said.

NCLIS is very much concerned about national information policy, which probably will be "a very heavy program focus" in coming years, Martin said. In fact, she added, NCLIS has scheduled a mid-July hearing on the Office of Technology Assessment report previously discussed by Gibbons.

Martin began her discussion of the second White House Conference on Library and Information Services by briefly reviewing the first conference held in 1979. Thousands of persons were involved in governors' conferences leading up to the national conference itself, she said. The governors' conferences produced some 3,000 resolutions, which the national conference sifted to produce 64 resolutions; of these, 55 have been acted upon.

One result of the first conference was the creation of the White House Conference on Library and Information Services Task Force (WHCLIST). Originally consisting of 100 persons—one library or information professional and one lay member from each state—WHCLIST was established to monitor the implementation of the resolutions from the first White House conference. However, WHCLIST has been meeting annually, she reported, and gradually has begun to assume the role of supporting the legislation for the second White House conference.

Several years ago, Martin said, NCLIS created a preliminary design group that worked out fairly comprehensive suggestions for the second conference. Several recommendations ended up in legislation authorizing the second conference, to be held between September 1989 and September 1991. The legislation was passed by Congress and signed by President Reagan in 1988.

The makeup of conference delegations has changed, Martin said. The first White House conference was one-third library professionals, one-third library friends and trustees, and one-third representatives of the general public. For the second conference, each of these groups will constitute one-fourth of the delegates; the remaining one-fourth of the delegation will consist of elected officials. The states are encouraged but not required to hold governors' conferences, so long as each state identifies an appropriate method for selecting conference delegates. A number of states have indicated their intent to voluntarily hold governors' conferences, and the possibility of convening some regional conferences is being discussed.

A 30-member advisory committee for the conference will include two *ex officio* members (the Librarian of Congress and the secretary of education), five members appointed by the Senate, five appointed by the House, ten named by the President, and eight selected by NCLIS. For the 1979 conference, one person chaired NCLIS, the advisory committee, and the conference itself. For the second conference, the chair of NCLIS is required by law to act as the vice-chair of the advisory committee. As a result of this change, an advisory committee chair will have to be selected.

Martin said she finds it interesting and important that the delegate structure has been changed to allow for elected officials. She said she does not see the White House conference as a conference of library and information professionals, but as a conference of people who are interested in libraries and information services and who will have some role in influencing how the nation's resources will be used to support library and information services.

Martin closed by urging members of the audience to also view the

conference that way. She encouraged them, in their roles as librarians and information professionals, to start educating persons on library boards and committees, so they can contribute fully and productively to the second White House conference. With this preparation, Martin predicted, conference delegates will produce results of lasting benefit to the library and information professions.

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# *Scholarship and the Need for Information*

Robert M. Rosenzweig

"The work of scholarship cannot proceed without a free flow of information. If the quality of available information is severely attenuated, the scholarly enterprise is weakened," said the fourth afternoon speaker, Robert M. Rosenzweig, president, Association of American Universities. His topic was "Scholarship and the Need for Information." After making these stipulations, Rosenzweig proceeded to examine pressures from industry and government on universities to restrict the flow of information related to scientific and advanced technological research.

As a cost of accepting research support from industry, universities voluntarily accept restrictions on the communication of research results and processes, Rosenzweig said. "The need of business to protect some proprietary interests through limited delays in publication is understandable and can generally be accommodated without compromising important institutional values," he added. "However, the desire to win research funds from industry, and in some cases the pressure on institutions to have such links, can be so strong that inappropriate arrangements are accepted."

That this happens "is beyond doubt," Rosenzweig said, but because such agreements are not widely known, there is no ready way of finding out how serious the problem is. "It is, however, a new element on the information scene and is to be closely watched," he added.

With respect to government, the picture is clearer, he said. "These last eight years have not been good ones for those who care about the free flow of information and ideas," he said. Those concerned should include all of those who care about democratic government, the nation's intellectual life, its scientific and technological progress, and its universities. However, this group has not been formidable enough "to prevent serious setbacks in the government's approach to information policy," Rosenzweig said.

Universities tend to do badly in an environment hostile to keeping open the channels of communication for ideas, information, opinion, truth, and even error, Rosenzweig observed. "In periods when error is deemed to have no rights, and it is, therefore, thought proper to stamp it out, then the expression of truth which is merely uncomfortable is

bound to be stifled in the process," Rosenzweig said. "That formulation of the problem is the more-or-less classical description of the nature and effect of the repression of unpopular ideas," he added.

The problem of the last eight years, however, is of a new and different kind that has little to do with ideas, he said. Part of the problem is rooted in the nature of the modern state and the post-World-War-II international arena, both dominated by science, and part is rooted in a characteristic of government—no matter how democratic—to believe it requires the ability to restrict the free flow of information. Governments always tend to be secretive about their own activities, Rosenzweig said, sometimes for good reasons, but more often to gain political advantage or avoid threatened disadvantage. The greater the threat as it is perceived by those in government, the longer their reach to restrict the communication of those who are not of government, but are somehow connected to it, Rosenzweig said. These premises ought to be basic civics lessons, he added.

Until recently, such lessons were of only academic interest to universities, which had little to do with government. Since World War II, however, that relationship has changed. "The major universities of this nation have become deeply enmeshed with the federal government in an embrace of mutual dependency that makes senior government officials as important as any wealthy donor once was, and that makes government policy an essential part of institutional calculations on a broad range of topics," Rosenzweig said.

Information policy is one of those topics and is a source of tension between universities and the government, whose interests "most pointedly" intersect in scientific and advanced technological research, Rosenzweig said. "The core of the problem lay in the belief of key officials of the Reagan administration that the practice of open dissemination of research results through publications, conferences, and exchange of technical personnel was harmful to the national security because it gave our adversaries the advantage of work that they could not do themselves," Rosenzweig said.

Through the application of the Export Control Act and several national security directives, the Reagan administration sought to restrict the communication of research results that it deemed threatening to the national security, Rosenzweig said. The principal ground was that the transmission of knowledge across borders can be every bit as damaging as the transport of military hardware, he said.

As result of this premise, government agencies attempted to control the communication of research results beyond what was classified; to screen research papers to determine if any part of them should be

withheld from publication; to reverse a long trend toward relaxation of classification rules; and to impose the FBI's Library Awareness Program, which Rosenzweig described as a "wonderfully Orwellian name for a program that consists of snooping on borrowers."

The Reagan administration also attempted to implement national security decision directive 84 (NSDD 84). Among its other provisions, the directive would have required more than 120,000 government employees to sign agreements requiring prepublication review of anything they proposed to publish for the rest of their lives—even after leaving the government. This directive was rescinded after strong congressional protests, but the administration used authority that already existed to require 240,000 government employees to sign prescreening agreements by the end of 1985. "So that you may sleep soundly tonight, knowing that the Republic is safe from the exposures of its former trusted officials," Rosenzweig said, the screening of nearly 45,000 manuscripts in 1984 and 1985 revealed 15 unauthorized disclosures of information.

Acknowledging that it is too early to determine how the Bush administration will treat these issues, Rosenzweig advised, "The attitudes that have propelled policy in recent years, and the apparatus that has been established to implement policy, ought to concern us all. Scholarship and institutions of scholarship do best when all the channels are open. That is the goal toward which we need to work."

# *Future of Information Policies: A Balancing Act*

## Anthony G. Oettinger

Anthony G. Oettinger, chair, Program on Information Resources Policy, Harvard University, concluded the forum. He explained how he remains independent enough to pursue controversial matters: he raises money in small doses from a wide range of sources in the public and private sectors and from domestic and foreign sources. "When you are bought by everybody, you are owned by nobody," he said.

Oettinger said he was pleased that those on the forum program had spoken of information *policies*, "with only a single hint of information *policy*, in the singular." He said the notion of a single, overarching information policy would trouble him.

Speaking of "the wonders of pluralism," Oettinger said that widespread interest in information issues is a mark of information "having arrived." When he first entered the information field, "there were only a few zealots guarding the treasure," he said. "Now that information has arrived, it is precisely where every other issue of major importance is—splattered all over the place." Things that do not matter, he added, "tend to be either nowhere or in one place."

Information is now sufficiently well recognized as being of widespread importance to "damn near everything in our society," Oettinger said, "and every committee of Congress is involved [with information policy], as Congressman Wise pointed out this morning."

Any attempt to make information policy monolithic is doomed to failure "because our system was designed with checks and balances, not only among the branches of government, but the private sector has a role, too," Oettinger said.

"As broad as the landscape is that has been sketched here today, it is only a small part of the whole landscape," Oettinger observed. In order to survive and do its task, he said, each party in that landscape "has to transform itself, has to run with other parties in recognition that these other parties are out there and that they need to be understood."

If democracy is to hold together and not fly apart, Oettinger said, advocacy ultimately has to recognize "all the folks out there with whom an accommodation has to be reached." Accommodation will involve balancing acts, knowing who is out there, who should balance what, what the stakes are, who the stakeholders are, and how all of these are interrelated, he said.

As an example of balancing interests, he discussed the role of the private sector in providing court reporting services that taxpayers otherwise would have to support. What has happened over the years, he said, is that "private sector outfits" transcribed court proceedings and sold records to the courts and other interested parties. There now are few U.S. jurisdictions in which taxpayers pay for the service. The minute that private-sector monopoly is eroded, the question of whether taxpayers are willing to pay, or whether they should pay, for the service is raised.

"I think this is intended as a mini-illustration of the kinds of threads among the various stakes and stakeholders that need to be teased out and brought into full view . . . if one is to carry out fully the agenda . . . of trying to get familiar with [those] with stakes in information and trying to reach accommodations," Oettinger said. "I hope that we can all continue down that road of democratic compromise."

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# *Texts*

*"[To give] information to the people . . . is the most certain, and most legitimate engine of government."*

—**Thomas Jefferson, 1787**
*In a letter to James Madison*

The texts published here were provided by Congressman Robert E. Wise, Jr. (D-W.Va.), chair, House Subcommittee on Government Information, Justice, and Agriculture, and the keynote speaker; Harold C. Relyea, specialist, American national government, Congressional Research Service, Library of Congress; and Robert M. Rosenzweig, president, Association of American Universities. Relyea prepared his paper, "Congressional and Federal Information Policies: The Bicentennial Record and the Future," as the centerpiece for the forum; it is published here in its entirety. The views expressed are those of the authors.

## *Keynote Address*

### Congressman Robert E. Wise, Jr. (D-W.Va.)

It is a pleasure to be here this morning.

While I have been chairman of the Government Information Subcommittee for only a few weeks, I am not a total stranger to federal information law. My introduction to these issues predates my election as chairman. It even predates my service on the subcommittee during the 98th and 99th Congresses.

In my earlier career as a practicing public-interest lawyer, I found the Freedom of Information Act (FOIA) to be an invaluable tool for obtaining information from government agencies. I learned that government files contained vast amounts of useful data and that the FOIA was the key that unlocks the files. Later as a state legislator, I supported efforts to narrow the exemptions in the West Virginia state FOIA law.

I believe that I am the first chairman of the subcommittee who used the FOIA prior to service in Congress. While my exposure to the FOIA as a requester came a long time ago, I still bring the user's perspective with me.

I hope that my previous experience will be valuable. Too often, decisions made here in Washington lack the viewpoint of the average citizen. Given the complex world we live in today, the political and policy process offers choices between alternatives that are remote from the people who are supposed to be the ultimate beneficiaries. I certainly do not expect to be able to bridge the gap all by myself, but I will do what I can.

The program for today's forum asks the question: "What is the role of Congress in formulating information policy?" This question was immediately followed by another: "How is that role balanced by the executive and judicial branches of the government?"

I was pleased to see these two questions posed together because Congress does not operate in a vacuum. We can establish policies and pass laws, but it is the President's responsibility to carry out the laws. It is up to the courts to give meaning to the words. In the long run, the congressional contribution can be the least important of the three branches.

I don't propose to offer a history of information policy legislation today. I expect that the next speaker will cover that territory. But a brief look at some of the important information laws will illustrate my point.

Nothing is more central to American information policy—and American government—than the First Amendment to the Constitution. The amendment was proposed during the First Congress by James Madison on May 4, 1789. Those who have lived through the lengthy FOIA legislative wars in recent years may be surprised to learn that the entire Bill of Rights cleared the Congress in less than five months. Ratification by the states followed in short order.

The First Amendment has remained unchanged for 200 years, guaranteeing free speech, free press, free exercise of religion, and the right of assembly. Despite the absence of change, there is, nevertheless, a substantial body of First Amendment law, all derived from judicial opinions. There are hundreds of cases interpreting the First Amendment; and thousands of articles, books, and speeches. There are lawyers and scholars who make a living by practicing First Amendment law. All of this derives from the few words initiated by the Congress in 1789.

I don't mean to suggest that no actions taken by the Congress in the last 200 years are relevant to our understanding of the First Amendment. My point is a simple one: the Congress is not the key player in the implementation of First Amendment policies or rights. It is the courts that have given life to the policy initiated by the Congress and approved by the states.

Let me next pick a much more complex example of the interrelationship between the three branches of government. The Freedom of Information Act was passed by the Congress in 1966 after an 11-year struggle. The FOIA was signed into law by President Johnson over the objection of just about every agency in town. The bureaucracy hated the idea of having to share information with the public.

The original FOIA was well intentioned but not well drafted. The law was a fine statement of public policy but an ineffective statute. Hostile agencies made mincemeat of the FOIA using standard tactics of delay, evasion, and bureaucratic procedures.

Some of the FOIA's original exemptions were overly broad, and agencies used the authority to withhold information that did not really require confidential treatment. Agencies paid little attention to the spirit of the law. They insisted instead on following the letter of the law to withhold every document they possibly could. The result was almost no disclosure by some agencies, and the FOIA was little used by the public.

Another loophole in the 1966 law was the absence of specific procedures and time limits. As a result, agencies were very slow to respond to requests, and delays of more than a year were common even though few requests were received. Judicial review was limited and ineffective, and the courts provided little assistance to requesters.

Looked at from the perspective of 1970, the role of the Congress in establishing an openness policy for the federal government would have appeared to be insignificant. Congress tried and failed. The FOIA was ineffective.

But as we all know, the story does not end there. After a few years of investigations and hearings, a major package of amendments to the FOIA emerged from the Congress in 1974. Agency hostility was unabated, and President [Gerald] Ford was talked into vetoing the legislation. Congressional resolve was firm, and the amendments were enacted over the veto.

The passage of the 1974 amendments over the veto of the President sent a message to agencies. The message was that Congress would not tolerate the executive branch's wholesale rejection of the policy initiative reflected in the FOIA. Congress favored disclosure of government documents, and it refused to accept the bureaucracy's attempt at nullification.

The 1974 amendments narrowed the exemptions, established firm time limits and procedures, and—perhaps most importantly—provided for meaningful judicial review. The effect of these changes was dramatic. For the first time, the FOIA became an effective tool for the disclosure of information.

As people discovered that the FOIA could be an effective means of obtaining information, they began to make requests in greater volume. Some agencies were overwhelmed by the number of requests received. Requesters once again had to wait a long time for a response, but this time the delays were the result of a high volume of requests rather than agency disinterest.

Congress had successfully asserted itself back into the information policy process with the 1974 amendments. But the amendments solved only some of the problems. The FOIA remained full of ambiguities and vague language.

The revision of the judicial review provisions effectively opened the door to the courthouse. Meaningful judicial review was available for the first time, and the judges responded. Requesters learned that the courts were willing to pay less attention to the clumsy wording of the statute and give more meaning to the spirit behind the FOIA.

The result was that a requester with the ability to take a case to court was able to receive effective, meaningful, and independent review of agency denials. Each successful case created a precedent that made it more difficult for agencies to arbitrarily withhold information in the future.

The 1974 amendments weren't perfect. They created almost as many problems as they solved. But from the broad policy perspective, the

amendments demonstrated continuing congressional interest and established effective enforcement through the courts. Combined with a strong public demand for access to government records, the Congress and the courts produced a change in the attitude of the executive branch.

Agencies finally agreed to take the law seriously. In order to deal with the increased number of requests, many agencies established formal FOIA offices staffed by professional civil servants. This institutionalized the FOIA process in the agencies. The FOIA officers set about to implement the law in an efficient and lawful way. While this hasn't solved all of the act's problems, it has helped considerably in making information available to requesters. In many ways, the development of a corps of dedicated FOIA officers may have been the best thing that happened to the act.

The success of the FOIA is not uniform throughout government. Perhaps the best agency is the Department of Health and Human Services (HHS), which reports that over 98 percent of all requests are responded to in full. The experience at HHS shows that a big agency can comply with the FOIA if it chooses to do so.

All is not perfect. In contrast to HHS, one of the poorer records has been compiled by the State Department. A recent report prepared by the General Accounting Office for the subcommittee showed that the processing of requests at State has broken down as a result of management inattention and lack of resources. Requests are delayed for months awaiting a few minutes of someone's time to conduct a search or mail out a response.

The history of the FOIA demonstrates how the Congress, the courts, and the executive branch each play a role in the policy process. It is apparent that continued pressure from Capitol Hill is still needed to overcome continuing agency resistance and to prevent backsliding. The record of the State Department demonstrates the need for congressional oversight.

As with other laws, information policy laws are not self-enforcing. A law can grow old and lose its effectiveness if the public and the Congress allow agencies to ignore it. The FOIA has met the challenge and prospered. By contrast, the Privacy Act has received little attention from the public, the executive branch, the Congress, and the courts. As a result, the Privacy Act has lost much of its effectiveness and remains only mildly useful as a protection against the invasion of privacy.

There is an obvious lesson here for dealing with the new challenges of the age of electronic information. The FOIA, the depository library program, the National Technical Information Service, and other fixtures of the federal information dissemination process are out of date. Our

information laws were written at a time when paper and other hard copy formats were all that existed.

The increasing computerization of federal government information is making these laws obsolete. Policies and practices that worked well with paper records do not solve the problems that come with modernization. Some have spoken of the need for an electronic freedom of information act. Such a law would make certain that the benefits of broad disclosure of government information are not lost as more data becomes electronic.

This is the major challenge facing information policy makers today. We cannot allow the new information technology to undercut the basic principles of openness that have served us so well in recent years. How are we going to accomplish this?

I think it is clear that changes are needed in the law. I support the idea of a FOIA for electronic media. But it is not at all clear what new law should provide. There is broad agreement on the need to provide for access to electronic records that is comparable to—or better than—the access now provided to paper records. But the policy problems are just as complex as the technology that supports the electronic records systems.

Given the difficulty of the problems, we cannot use the model of the FOIA. The Congress cannot shove a law down the throat of the executive branch and then wait for later amendments and judicial decisions to make the law workable. It is apparent from the history of the FOIA that a more cooperative approach will be more effective.

I am optimistic that we can succeed in working with the executive branch. The Office of Information and Regulatory Affairs at OMB [Office of Management and Budget] has been working on information dissemination policies during the last few years. While I am not in agreement with every element of those policies, I support the effort to establish a uniform, central policy for information dissemination.

I also detect a growing interest in the problem of electronic information dissemination among the user community. Public interest groups, librarians, and the private information industry are all concerned about the information policy process as well as the availability of information.

I am not prepared today to announce a schedule for resolving these matters. Congress needs to take a lead role in setting policy, but I am not sure when we will be ready to act. More preliminary work needs to be done before we can sit down to draft legislation and hold hearings.

In the meantime, I look forward to working with everyone who has an interest in the development of federal information policy. I believe that we will be able to make progress if we all work together.

*"The informing function of Congress should be preferred even to its legislative function."*

—Woodrow Wilson, 1885

# *Congressional and Federal Information Policies: The Bicentennial Record and the Future*

**Harold C. Relyea**

Over a century ago, a young graduate student, Woodrow Wilson, later to be the twenty-eighth President of the nation, wrote *Congressional Government*, the first major analysis of the United States Congress. There, he penned a simple but startling statement: "The informing function of Congress should be preferred even to its legislative function." In operational terms, what Wilson had in mind regarding the "informing function" was, clearly, what is now called oversight. "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government," he wrote, "the country must be helpless to learn how it is being served."

There was, however, more to his view regarding the informing function. He also noted that "unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct."[1] A few years earlier, in 1877, Representative James Garfield, later to be our twentieth President, had described such "discussion" in the following words published in *The Atlantic Monthly*.

> Congress has always been and must always be the theatre of contending opinions; the forum where the opposing forces of political philosophy meet to measure their strength; where the public good must meet the assaults of local and sectional interests; in a word, the appointed place where the nation seeks to utter its thought and register its will.[2]

Oversight and open debate continue to be important realizations of the informing function of Congress. Nonetheless, on the occasion of the two hundredth anniversary of the federal Congress, it can also be said

that the first branch has used its legislative power in service to the informing function as well. This has not been merely accommodation to the media, but a studied consideration of many related values, resulting in, though not always perfectly realized, various federal information policies.

The history of federal information policy development, and the congressional role in it, begins somewhat before the federal government actually became operative. Those origins lie in the Constitution. A meaningful account, however, is not accomplished with a simple linear portrayal of events. Thus, clusters of developments, related by common policy significance, are considered here and, in the interest of being somewhat concise, only highlights are offered.[3] Together, they constitute a patchwork of overlapping areas of policy evolution, often impinging upon and sometimes dynamically affecting one another. The resulting history of federal information policies, while neither exhaustive nor definitive, examines the constitutional context, the publication foundation, accountability and administration considerations, national security struggles, and personal and institutional confidentiality protections. A concluding segment considers the role of Congress in future information policies.

## THE CONSTITUTIONAL CONTEXT

The Constitution of the United States created a limited government with some explicit powers and responsibilities. Certain of these concerned information matters. Among the enumerated powers of Congress, for example, are authority to "establish Post Offices and Post Roads," to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries," to "make Rules for the Government and Regulation of the land and naval Forces" (Article I, Section 8, clauses 7, 8, and 14), and to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Article IV, Section 3, clause 2).

In the Bill of Rights, guarantees are made concerning speech and press freedoms (Amendment I), the security of personal papers against "unreasonable searches and seizures" (Amendment IV), and not being "compelled in any Criminal Case to be a witness against" oneself (Amendment V). Also included are rights to a public trial in criminal prosecutions and "to be informed of the nature and cause of the accusa-

tion; to be confronted with the witnesses against [oneself]; [and] to have compulsory process for obtaining witnesses in [one's] favor" (Amendment VI).

The Constitution created a government accountable to the people and itself as well. There was an expectation that government leaders would keep the citizenry informed of developments, or at least maintain a record of their activities. In this regard, the Constitution specifies that each house of Congress "shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy" (Article I, Section 5, clause 3). Concerning the duties of electors, the Twelfth Amendment prescribes "they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and the number of votes for each, which lists they shall sign and certify" (Article II, Section 1, clause 3). With regard to the subnational level of government, the Constitution states: "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State" (Article IV, Section 1, clause 1).

Moreover, with its system of checks and balances, the Constitution anticipated that each branch would be knowledgeable of the activities and interests of the other two. In this regard, the Constitution specifically provides that, when the President vetoes a bill, "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal and proceed to reconsider it" (Article I, Section 7, clause 2). Concerning interbranch accountability, provision is made for the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (Article II, Section 2, clause 1). Finally, the Constitution indicates that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient" (Article II, Section 3).

In many regards, these constitutional references to information matters indicate some fundamental expectations regarding government accountability and communication, the exercise of certain popular rights regarding information, and subsequent legislation on at least a few particular information subjects. Furthermore, historically, as experience and practice suggested that Congress create and refine additional statutory information policies, these, among other constitutional considerations, have guided the legislative process. While such policies have largely been developed in an evolutionary manner by the first branch,

there also have been important congressional contributions of both a revolutionary and a counter-revolutionary character.

## THE PUBLICATION FOUNDATION

During the Constitutional Convention of 1787, James Wilson of Pennsylvania stressed the importance of official printing and publication by the new government. Addressing a proposal to allow each chamber of the federal Congress a discretion as to the parts of its journal that would be published, he told the delegates: "The people have the right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."[4] The following year, James Madison and George Mason raised a similar consideration during the Virginia Convention on the new Constitution when speaking about the importance of publishing all receipts and expenditures of public money under the new government.[5]

In deference to views such as these, the federal Congress quickly provided for the printing and distribution of both laws and treaties,[6] the preservation of state papers,[7] and the maintenance of official files in the new departments.[8] Controversial legislation, such as the Alien and Sedition Acts, prompted a special publicity effort.[9] The printing and distribution of both the Senate and House journals was authorized in 1813.[10] Congress arranged for a contemporary summary of chamber floor proceedings to be published in the *Register of Debates* beginning in 1824. It then switched in 1833 to the weekly *Congressional Globe*, which sought to chronicle every step in the legislative process of the two Houses, and then established a daily publication schedule for the *Globe* in 1865.[11] Subsequently, the *Congressional Record* succeeded the *Globe* in March of 1873 as the official congressional gazette.[12] It was produced by a new federal printing agency created by Congress.

Provision was initially made in 1846 for the routine printing of all congressional reports, special documents, and bills.[13] While these responsibilities were met for many years through the use of contract printers, such arrangements proved to be subject to considerable political abuse. Consequently, in 1860, Congress established the Government Printing Office to produce all of its literature (including, eventually, the *Congressional Record*) and to serve, as well, the printing needs of the executive branch.[14] Additional aspects of government-wide printing and publication policy were set with the Printing Act of 1895, which is the source of much of the basic policy still found in the printing chapters of Title 44 of the United States Code.[15]

Congress, in addition to publishing the statutes and a variety of legislative literature (including executive branch materials which were initially produced as Senate or House documents), promoting newspaper reprinting of laws and treaties, and circulating printed documents through official sources, also developed a depository library program to further facilitate public knowledge of government actions. In 1859, the secretary of the interior was statutorily tasked with distributing all books printed or purchased for the use of the federal government, except those for the particular use of Congress or executive branch entities.[16] A decade later, in 1869, a subordinate officer in the department — the Superintendent of Public Documents—was mandated to perform this responsibility.[17] Distributions were made to certain libraries throughout the country which were designated to be depositories for government documents. This arrangement had been begun in 1813 with regard to congressional materials[18] and extended in 1857 to include other federal literature.[19] The Printing Act of 1895 relocated the Superintendent of Public Documents, making the position an integral and important role within the Government Printing Office.[20]

In the relocation process, the superintendent was also given responsibility for managing the sale of documents and preparing periodic indices of printing office products. Until 1904, the sale stock available to the superintendent derived entirely from such materials as were provided for this purpose by the departments and agencies or were returned from depository libraries. The situation was altered when the superintendent was granted authority to reprint any departmental publication, with the consent of the pertinent secretary, for public sale.[21] Congress legislated comparable discretion to reproduce its documents in 1922.[22]

There were, of course, other related developments paralleling these events. For example, Congress first addressed the protection of intellectual property rights in 1790 with patenting and copyright statutes, and has continued to remain attentive to both areas of law.[23] Information protected under federal patent law has the status of being an open secret: a patent holder enjoys a 17-year right of exclusive use regarding his or her invention, yet science and technology benefit as well from the availability of the knowledge involved. Copyright provides protection for a broad variety of original works of authorship fixed in any tangible medium of expression. Among the latest developments in this area was a 1988 congressional enactment allowing the United States to join the Berne Convention for the Protection of Literary and Artistic Works, an international treaty providing copyright safeguards among signatory nations.[24]

Other historically significant institutional developments pertaining to government document, publication, and information availability include the 1800 inauguration of the Library of Congress[25] and the 1862 origination of the National Agricultural Library.[26] In more recent times, the National Archives was chartered in 1934,[27] a statutory avenue for the National Technical Information Service was legislated in 1950,[28] and, only a short time ago, federal information centers were congressionally mandated.[29]

## ACCOUNTABILITY AND ADMINISTRATION

Shortly after the dawn of the twentieth century, the federal government entered a new phase — the rise of the administrative state. Among the forces contributing to this development was the Progressive Movement, which sought greater government intervention into and regulation of various sectors of American society. An autonomous Department of Labor was established in 1913 along with the Federal Reserve. The Federal Trade Commission was created the following year. With United States entry into World War I, regulatory activities further expanded and the number of administrative agencies increased. With the postwar era, government expansion momentarily slowed, but began again with the onset of the Great Depression and the arrival of the New Deal.

As federal regulatory powers and administrative entities dramatically grew during this period, there was a concomitant increase in both the number and variety of controlling directives, regulations, and requirements. While one contemporary observer characterized the operative situation in 1920 as one of "confusion,"[30] another described the deteriorating conditions in 1934 as "chaos."[31] During the early days of the New Deal, administrative law pronouncements were in such disarray that, on one occasion, government attorneys arguing a lawsuit before the Supreme Court were embarrassed to find their case was based upon a nonexistent regulation,[32] and on another occasion, discovered they were pursuing litigation under a revoked executive order.[33]

To address the accountability problem, Congress created an executive branch gazette. Such a publication had been temporarily produced during World War I. Printed as a tabloid newspaper, the *Official Bulletin* contained presidential orders and proclamations along with department and agency directives, as well as various news items pertaining to the European hostilities. Issued each workday, it reached a peak circulation of 118,000 copies in August of 1918.[34]

The new gazette, statutorily authorized in July, 1935, was named the *Federal Register*.[35] Produced in a magazine format, it contained a variety of presidential directives and agency regulations, and was eventually published each workday. In 1937, Congress inaugurated the *Code of Federal Regulations*, a useful supplement to the *Register*.[36] This cumulation of the instruments and authorities appearing in the gazette contained almost all operative agency regulations, and was eventually updated annually. It was organized in 50 titles paralleling those of the United States Code, with Title 3 containing presidential instruments.

Later, the general statutory authority underlying the *Federal Register* was relied upon for the creation of other series of publications — the *United States Government Manual*, which has been available for public purchase since 1939; the *Public Papers of the Presidents*, which were first published in 1960; and the *Weekly Compilation of Presidential Documents*, which was begun in the summer of 1965.

The accountability arrangements established with the creation of the *Federal Register* and *Code of Federal Regulations*, however, addressed only half of the problem. Uniformity in the form and promulgation of agency regulations remained an issue. The attorney general created a study committee to explore this matter, and it reported in 1941.[37] Consideration of its recommendations was temporarily postponed due to United States entry into World War II. Congress and the executive branch subsequently cooperated in the development of the Administrative Procedure Act, which was enacted in 1946.[38] In addition to establishing a uniform procedure for the promulgation of agency regulations, the statute also contained an important public information section which directed the agencies to publish in the *Federal Register* "the established places at which, and methods whereby, the public may secure information or make submittals or requests."[39] However, broad discretionary allowances also were made for protecting information, and a changing climate of opinion within the federal bureaucracy soon transformed this public information mandate into a basis for administrative secrecy.

Conditioned by recent wartime information restrictions, intimidated by zealous congressional investigators and other official and unofficial pursuers of disloyal Americans both within and outside of government, and threatened by various postwar reconversion efforts at reducing the executive work force, the federal bureaucracy was not eager to have its activities and operations disclosed to the public. Attempts by the press and scholars to gain access to department and agency records were often stymied by a "need-to-know" policy, deriving from the housekeeping statute and the Administrative Procedure Act. The first of these laws, dating to 1789, granted the heads of departments considerable discre-

tion to prescribe regulations regarding the custody, use, and preservation of the records, papers, and property of their organization, including setting limitations on the public availability of these materials.[40] The Administrative Procedure Act indicated that matters of official record should be accessible to the public, but allowed restrictions to be applied "for good cause found" or "in the public interest." Such authorities did not so much foster the "need-to-know" policy, but, rather, justified it.

By the early 1950s, many sectors of American society, including legal and good government reformers, the press, and elements of Congress, were unhappy with this situation and with burgeoning administrative entities that would not account for their actions by responding to information requests. Consequently, in 1966, after a long congressional examination and a difficult legislative struggle, the public information section of the Administrative Procedure Act was replaced by a new statute and a new concept in information access. It was a revolutionary contribution to federal information policy. The Freedom of Information Act (FOIA) established a presumptive right of public access to department and agency records, specified nine categories of information that could be exempted from the rule of disclosure, and provided for court resolution of disputes over the availability of requested materials.[41] Subsequently amended, with portions subject to considerable judicial interpretation, the statute has remained a very effective tool for enabling public access to topical records from entities of the administrative state.

The act has also served as a model for other information access laws. An example in this regard is the Privacy Act of 1974, which sets certain standards of fair information use, prohibits the collection of some kinds of personally identifiable information, and otherwise allows American citizens to gain access to a great many files on themselves which are held by federal agencies.[42]

Beyond the documentary realm, the Freedom of Information Act was a model for two laws concerning public observation of executive branch deliberations. The Federal Advisory Committee Act of 1972 established a presumption that agency advisory committee meetings would be open to public scrutiny, specified conditions when the rule of openness might be modified, and provided for court resolution of disputes over the propriety of closing such meetings. It also set certain conditions regarding public notices of advisory committee meetings and called for balance in the selection of advisory committee members.[43]

The Government in the Sunshine Act of 1976 presumes that the policy-making deliberations of collegially-headed federal agencies — such as boards, commissions, or councils — will be open to public scrutiny unless closed in accordance with specified exemptions to the

rule of openness. Disputes over the propriety of closing a meeting may be resolved in court. Conditions regarding public notice of such meetings are specified.[44] The Sunshine Act is the most recent major enactment by Congress to assure greater public accountability on the part of the administrative state.

## NATIONAL SECURITY

Since the earliest days of the Republic, government officials have engaged in the practice of assigning a secret status to certain kinds of sensitive information. Such actions were taken to assure the survival of the nation in a dangerous world, and usually concerned foreign affairs, defense, or intelligence matters. In more recent times, this protection has been afforded to a new, broad, somewhat nebulous category or interest called "national security."[45]

The executive branch, including the armed forces, engaged in such information security-secrecy practices for over a half century before Congress, for the first time, in 1857, statutorily authorized the President

> to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular offices, the transaction of their business . . . , the safekeeping of the archives, the public property in the hands of all such officers [and] the communication of information . . . from time to time, as he may think conducive to the public interest.[46]

Formal military secrecy directives or regulations appeared only after the Civil War. The initial Army General Order of 1869 concerning security-secrecy pertained to the physical protection of forts and coastal defenses. Such facilities were not to be photographed or otherwise depicted without prior permission from appropriate officials. This limited application underwent a series of evolutionary adjustments and, shortly after United States entry into World War I, resulted in a fully developed information security classification system.[47]

In 1911 and 1917, Congress provided for the criminal punishment of espionage and the acquisition of valuable defense information by spies.[48] Neither law, however, specifically sanctioned the information secrecy practices of the military departments or the armed forces. Initially, the

military departments made no mention of the espionage laws in their information security orders and directives, but soon such regulations began referring to these laws as a basis for their enforcement.

Relying upon a 1938 statute concerning the protection of armed forces installations and equipment and "information relative thereto," President Franklin Roosevelt assumed responsibility for security classification policy and procedure by issuing a March, 1940, executive order.[49] It largely paralleled Army and Navy regulations for marking and handling secret records and gave civilian employees of the military departments authority to classify information. However, the legislative history of the 1938 statute, upon which the President relied to issue his directive, provided no indication that Congress anticipated or expected that such a statutory classification arrangement would be created.[50] Indeed, the executive order may have been a substitute for statutory authority which Congress might not have granted. The case of the War Security Act is illustrative. Prepared at the direction of Attorney General Francis Biddle, the proposal would have given the executive branch broad powers for maintaining internal security, including information matters, within the United States.[51] Evoking considerable public controversy, the measure, sharply debated by the House during a time when the outcome of the war was uncertain, was not given consideration by the full Senate.[52]

Congress seemingly has evidenced a general reluctance to authorize directly or legislate a government-wide information security classification system. While it has mandated information security arrangements for atomic energy data,[53] intelligence sources and methods[54] (as well as other intelligence considerations[55]), and patent applications having national security implications,[56] Congress, through various committees and subcommittees, for 30 years, successfully encouraged and pressured presidents from Eisenhower to Reagan to narrow classification criteria and limit discretionary authority to classify.[57] The Reagan administration's revolutionary 1982 executive order, despite some congressional criticism,[58] reversed the prior historical trend by expanding the categories of classifiable information, by mandating that information falling with these categories be classified, by making reclassification authority available, by admonishing classifiers to favor classification in deciding close cases, and by eliminating automatic declassification arrangements.[59]

Historically, Congress also has periodically been wary and sometimes critical of government propaganda and censorship efforts. Congressional distaste for executive branch manipulation of official information was apparent in 1913 when it prohibited the use of appropriated

funds "to pay a publicity expert unless specifically appropriated for that purpose."[60]

When President Woodrow Wilson sought to establish a premier agency for combined propaganda and censorship functions during the nation's involvement in World War I, he did not turn to Congress, but relied instead upon his own constitutional authority and financial resources. The Committee on Public Information, created by an executive order in April of 1917, was largely funded from the President's discretionary national security and defense account. Congress cautiously appropriated only $1.25 million, less than one-fifth of the committee's total budget, during its three-year existence.[61]

Eleven days after the Japanese attack on Pearl Harbor, Congress completed work on the First War Powers Act and the legislation was signed into law.[62] It conferred on the President authority to censor all communications from the United States to foreign countries. Domestically, the press and radio were controlled on a strictly voluntary and extra-legal basis under a Censorship Code issued by the Office of Censorship. While the primary agency in these matters, the Office of Censorship, was again created by executive order, Congress appeared to be more willing to finance this wartime entity. Starting out in 1942 on $7.5 million allocated from the President's emergency fund, the office was subsequently appropriated $26.5 million for 1943, $29.6 million for 1944, and $29.7 million for 1945.[63]

Wartime propaganda was largely handled by the Office of War Information (OWI), established in June of 1942 by another executive order. The new entity immediately aroused congressional suspicions because it not only appeared to be engaging in questionable and perhaps illegal "flackery," but also was seen by opponents to be the latest in a series of publicity structures promoting the New Deal.[64] Soon OWI publications came under congressional criticism. Verbal characterization and photographic depiction of Roosevelt in the first issue of *Victory*, a War Information magazine designed for overseas distribution, brought allegations that this was expensive campaign literature designed to help the President win a fourth term. A pamphlet on taxation was resented because it favored withholding taxes, and a booklet on inflation "attracted criticism for its support of policies that were still under congressional consideration."[65] Congressional distaste for the domestic publicity efforts of OWI became quite apparent in 1943. The House Committee on Appropriation reduced the office's funding request for home front activities by almost 40 percent to $5.5 million. House floor debate on OWI finances resulted in even more drastic action: a 218-114 vote to abolish entirely the domestic branch of the office. The Senate rejected

this prospect and reinstated $3,561,499 for War Information program activities within the United States. This amount was reduced to $2.75 million by conferees of the two houses, prompting the office to curtail sharply its domestic publicity efforts.[66]

In November, 1954, Secretary of Commerce Sinclair Weeks announced that, at the direction of the President and on the recommendation of the National Security Council, he was creating an Office of Strategic Information within his department.[67] The mission of this new entity, according to the secretary, was to work with various private sector groups "in voluntary efforts to prevent unclassified strategic data from being made available to those foreign nations which might use such data in a manner harmful to the defense interests of the United States."[68] The office, however, was something of an anomaly. It had no legislative charter and its activities, in many regards, appeared to overlap with certain more clearly stated statutory functions of other agencies. Because the concept of "strategic information" was not clearly defined, its regulatory application seemed to be of uneven or sometimes unfair impact. Nonetheless, the new office was created to identify imbalances favoring the Communist bloc in exchanges of scientific, technical, and economic information, and to alert federal agencies as well as scientists, businesses, and the press to the dangers of indiscriminate publication of unclassified information of possible benefit to an enemy nation.

A newly created House subcommittee on government information examined the mission and activities of the Office of Strategic Information. Finding the agency to be duplicating the efforts of other regulatory entities, somewhat intimidating to the journalistic and scientific communities, and potentially censorial, the subcommittee urged its abolition. The recommendation was subsequently endorsed by the parent Committee on Government Operations.[69] In April 1957, the House of Representatives eliminated all funds for the Office of Strategic Information and prohibited the transfer of any money from other sources for its continuation.[70] When the Senate agreed to this action, Secretary Weeks was forced to abolish the entity.[71]

Congressional concern about government propaganda activities was once again evident in 1972. In the aftermath of the domestic airing of a United States Information Agency (USIA) film, *Czehoslovakia 1968*, in a televised report, a dispute arose over the legality of USIA distribution of its materials within the nation's borders. In reaction to an attorney general's ruling sustaining the showing, Congress included in the Foreign Relations Authorization Act of 1972 a virtual blanket prohibition on USIA making its products available within the United States.[72]

Finally, with regard to national security restraints on government

information, Congress recently indicated its opposition to widespread use of secrecy agreements. In March of 1983, a national security decision directive, NSDD 84, entitled "Safeguarding National Security Information," was released by the White House through a press conference at the Department of Justice.[73] Although signed by the President, such directives, unlike executive orders, are not required to be published in the *Federal Register*.[74] They are a specialized presidential instruction series, usually assigned a security classified status, and maintained in the files of the National Security Council.[75] NSDD 84 provided:

> that all present and future employees of the executive branch with authorized access to classified information be required to sign a nondisclosure agreement as a condition of access to such information;
>
> that all present and future employees of the executive branch with authorized access to Sensitive Compartmented Information or SCI, a kind of intelligence information, be required to sign a nondisclosure agreement as a condition of access to SCI and other classified information, and that this particular agreement must include a provision for prepublication review of public writing andpublications to assure deletions of SCI and other classified information;
>
> that executive branch employees be required to submit to polygraph examinations, when appropriate, in the course of investigations of unauthorized disclosures of classified information, including SCI; and
>
> that the departments and agencies develop and adopt appropriate policies and procedures to govern contacts between media representatives and executive branch employees, so as to reduce the opportunity for negligent or deliberate disclosures of classified information.

Secrecy agreements of the type mandated by NSDD 84 had been in use for at least a decade within the federal intelligence community and a few other agencies possessing particularly sensitive information.[76] In 1980, such agreements were found by the Supreme Court to be a proper enforcement device to prevent the unauthorized disclosure of classified information.[77] NSDD 84 extended the use of this particular type of secrecy agreement to all executive branch employees, including contrac-

tors and grantees, having access to classified information. It also required agency personnel, contractors, and grantees outside of the intelligence community who had access to sensitive compartmented information, or SCI, to submit their public writings and publications to prior review by government officials. This latter secrecy agreement would be binding upon signatories for the rest of their lives, regardless of whether or not they continued to have access to SCI.

The new directive prompted not only a number of protests against its breadth and accompanying enforcement demands, but also serious questioning of the related use as well as the reliability and validity of polygraph testing.[78] Various congressional panels held hearings on the need for the new directive and urged delaying its implementation to allow further study of the matter.[79] Administration representatives appeared before all of these bodies to defend the ordered policy. However, because there appeared to be no willingness to postpone the effectuating of the directive, two actions were taken by Congress. First, provisions were appended to the Department of Defense authorization in both the Senate[80] and the House[81] to prevent increased use of polygraph tests by the department (which has the largest number of personnel having access to classified information), as anticipated by NSDD 84, prior to April 15, 1984. This temporary moratorium remained in the authorization legislation signed by the President in late September, 1983.[82]

Next, a provision was appended in the Senate to the Department of State authorization to prevent the post-employment application of the prepublication review requirement anticipated by the directive prior to April 15, 1984.[83] This prohibition became law when the President approved the legislation in late November, 1983.[84]

Both of these temporary limitations on the implementation of portions of NSDD 84 provided a clear indication of congressional displeasure. The following year, legislation was introduced to make these proscriptions permanent.[85] As the bill began receiving committee consideration in the House,[86] the press reported that the Reagan administration was willing to concede on the points of greatest objection to Congress.[87] Soon the President's national security adviser informed managers of the legislation that, on President Reagan's instructions, plans to implement the polygraph testing and post-employment prepublication review provisions of the national security decision directive were being suspended "for the duration of this Congress."[88] Consequently no further action was taken on the pending bill.

What the administration actually did, however, was discontinue using the secrecy agreement form authorized by NSDD 84 and substitute an older form utilized by the intelligence community.[89] Clearly, the

policy of more widespread use of secrecy agreements in furtherance of information security had not been abandoned. In response, Congress, in a joint resolution continuing appropriations for fiscal year 1988, set a qualified prohibition on utilizing appropriated funds to implement or enforce employee secrecy agreements.[90] In May of 1988, this restriction came under constitutional challenge,[91] provoking additional congressional ire,[92] and the matter is currently on appeal to the Supreme Court.[93]

## CONFIDENTIALITY

Apart from national security considerations, information is also lawfully protected to maintain the integrity of persons. In the case of individuals, such protection is understood as privacy. However, in the case of corporate persons, protection extends to proprietary or commercially valuable information.

Individual privacy, the wish not to be intruded upon, probably predates recorded history. Certainly it was one of the presocietal or "natural rights" which the founding fathers sought to preserve. When drafting the Bill of Rights, they gave constitutional recognition to privacy expectations in the First Amendment, including the right not to have to speak, privacy of opinion, freedom of association, and the right of anonymous or pseudononymous expression; the Third Amendment, prohibiting the quartering of troops in private homes during peacetime without the owner's consent; the Fourth Amendment, guaranteeing personal security against unwarranted searches and seizures; and the Fifth Amendment, specifying the privilege against self-incrimination. In a landmark 1965 decision, the Supreme Court viewed these and the Ninth Amendment as being the source of a penumbral right of privacy.[94]

Through the years, for various government activities and programs involving the collection and maintenance of personally identifiable information such as the census and income tax returns, Congress has legislated prohibitions on the disclosure of such data. These statutory restrictions are recognized in the third exemption of the Freedom of Information Act,[95] as is the general right of privacy in the sixth exemption.[96] The Privacy Act prohibits government agencies from collecting some kinds of personally identifiable information. It also allows American citizens to gain access to and make supplemental corrections of a great many records on them which are in agency files. Sadly, this possibility constitutes a concession of sorts that much of the autonomous determination of when, how, and to what extent information about oneself is communicated to others has been lost in the face of technologi-

cal encroachments. Traditional expectations of individual privacy have been diminished and replaced by expectations of records accuracy. In recent years, Congress has produced several laws providing citizens greater control over personal records held by third parties, including the Fair Credit Reporting Act,[97] the Privacy Act,[98] the Family Educational Rights and Privacy Act,[99] and the Pupils' Rights Act,[100] among others.[101]

A century ago, the Supreme Court recognized corporations as being "persons," but has not vested them with the privacy rights reserved for individuals.[102] Generally, when legal protection has been accorded to the information of corporate entities, it has been done for economic reasons and without explanation in terms of privacy rights. Perhaps the best known statutory prohibition in this regard is the Trade Secrets Act, which makes the disclosure of trade secrets by a federal officer or employee criminally punishable.[103] This particular authority, which was created in a 1948 recodification of the federal criminal code,[104] derives from a 1864 income tax nondisclosure statute,[105] a 1916 Tariff Commission nondisclosure statute,[106] and a 1938 Commerce Department nondisclosure law.[107] A 1977 study prepared by the Department of Justice identified 90 operative statutes "reflecting varied approaches to the regulation of the disclosure by federal agencies of the information they collect from or maintain about business entities.[108] Moreover, open government laws like the Freedom of Information Act[109] and the Government in the Sunshine Act[110] contain exemptions for the protection of trade secrets and confidential commercial information.

## GUIDING FUTURE INFORMATION POLICIES

This historical overview, surveying the highlights of the legislative contribution of Congress to federal information policies, is limited in many regards. For example, not only are the influences of congressional opinion molding and oversight omitted, but also little or no attention is given to lost opportunities or unsuccessful moments in this history. Nonetheless, imperfect as the portrayal is, what can be discerned for the future: what prologue lies in this view of the past?

Of the various challenges that might confront Congress regarding the future of federal information polices, two developments appear to have central importance: the onset of the electronic information mode and the emergence of the national security state. The implications of the former of these phenomena probably are better understood as, for example, a recent Office of Technology Assessment report, among others, indicates.[111] The latter seems to be more difficult to assess, perhaps because

its inroads are sometimes subtle and frequently cloaked in secrecy, and the powers exercised, while arguably necessary for the survival of the nation, can impair the tripartite balance of our constitutional system, if not fundamental freedoms guaranteed by the Bill of Rights.[112]

Returning to the policy clusters used to structure this overview, publication policy has been profoundly affected by the electronic information mode. Production and dissemination capabilities facilitated, for example, by telecommunications, compact disk-read only memory (CD-ROM), and desktop publication, suggest that a congressional reconsideration of the concept of publication, both in law and in practice, is in order, as are the attending roles of the Government Printing Office (GPO) and the Joint Committee on Printing.[113] The mission and future of the statutorily mandated federal depository library program are also affected by these considerations. If government "publications" are produced and disseminated by electronic means that place them outside the managerial control of the Government Printing Office, they may not be available for depository library selection or GPO indexing. Furthermore, if depository libraries are not upgraded to make better use of publications and data in electronic formats, they will become outmoded. Perhaps the national libraries chartered by Congress, such as the Library of Congress and the National Agricultural Library, should be authorized to make selected portions of their holdings available to other libraries in electronic formats. Fortunately, some of these issues are already under consideration by relevant congressional committees and support agencies, but much remains to be resolved regarding them, and other related matters still await attention.

The onset of the electronic information mode poses similar challenges in the accountability and administration area. Among the issues to be considered are the adequacy of record access laws, such as the Freedom of Information Act (FOIA), to provide public access to government records maintained in electronic formats, the extent to which technological barriers to public access are posed by electronic information situations, the durability of electronic information media such as hard and soft disks or magnetic tape, the continued capability and availability of software and hardware to use and translate electronically held information, and the security of electronic information media and systems holdings against tampering, unauthorized alterations, theft, sabotage, or loss.

Further, as the quantity of government information maintained in electronic formats increases and becomes available through the FOIA, pecuniary concerns may arise as the private sector information industry acquires this information and profitably markets it with value-added

features. In this event, Congress may wish to reconsider the adequacy of the FOIA fee arrangements regarding commercial use.

Finally, cost considerations attending increased use of electronic formats and technology for collecting, maintaining, and disseminating government information, including the production and dissemination of government "publications" by electronic means, will probably continue tensions between the Office of Management and Budget (OMB) and Congress regarding "information resources management." While the concept has now been statutorily defined,[114] some congressional overseers are vigilant to see more, and some less, OMB effort, in the information resources management context, to regulate agency information collection on the basis of pertinency to an agency's mission or unfair competition with private industry. There is also divided interest in whether OMB may seek, directly or indirectly, to privatize certain government information services by contracting them to some entity other than a federal agency. These information resources management issues, as well as the role of OMB in the acquisition and distribution of electronic information technology and the production and dissemination of "publications" in electronic formats, may require further legislative attention by Congress.

In the national security area of federal information policy, Congress will be confronted with the continued emergence of changing national security claims and initiatives. Varying degrees of secrecy constitute the central issue of concern. Better use of security classification could command congressional attention in various regards. For example, millions of federal documents are security classified every year and added to the growing mountain of officially secret material. To facilitate use of this volume of classified literature (some in electronic formats), over four million individuals have been cleared for access to such protected records. It has been argued that this is a system of excess, involving too much information, too many people, and too great a cost in terms of both money and public confidence. Almost two decades ago, the late Associate Justice Potter Stewart warned of the practical perils of such extravagance in his concurring opinion in the *Pentagon Papers* case, saying, "... when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion."[115]

While Congress has never been eager to mandate directly a government-wide security classification program, it has not been insensitive to security concerns and other innovations might be explored to reform the current system. Through a biennial authorization of the executive

branch management entity for security classification activities, the Information Security Oversight Office (ISOO), Congress might enlist its assistance in responsibly scaling down classification arrangements to more efficient, economical, and effective proportions. Using the model of OMB budget examiners, Congress could consider vesting ISOO with classification management officers who would be located in agencies creating the bulk of classified documents. These managers could be responsible for policing classification actions, recommending rewards and penalties for classifiers, and promoting proper declassification of materials. In addition, or alternatively, criteria and procedures for declassification might be statutorily specified.

Turning to another issue, efforts have been made, with some success, to curtail, for reasons of national security, traditional communication of unclassified scientific and technological information. Such action has been based on the contention that a hemorrhage of militarily valuable knowledge to the Soviet Union and its Warsaw Pact allies has occurred as a consequence of open scientific communications. Relying largely on export control and sponsored research authority, federal agencies have sought to regulate some teaching, university research, professional conference presentations, and other impartings of research findings to foreigners by American scientists. In response, many scientists have sought to refute these contentions,[116] arguing that national security is not achieved by secrecy in science, but by scientific achievement and advancement, which require traditional open professional communication. Congress may wish to examine this issue when next reauthorizing the Export Administration Act[117] or, in a broader context, when considering trade competitiveness or international science policy.

Also noteworthy are recent concerns about presidential use of secret national security decision directives to set policy and otherwise commit the nation and its resources to particular positions or courses of action.[118] These instruments are not shared with Congress, may infringe upon the legislative powers of the first branch, and may serve highly controversial and questionable purposes. Cloaked in the *raison d'etat* of national security, such pronouncements, which approach being secret law, must not only pass constitutional muster, but also enjoy a high degree of certainty that the citizenry will be supportive if given the opportunity to know their contents. There is strong likelihood that congressional interest in the use, legal status, and accountability of these and similar directives will continue in the future.[119]

Finally, in the area of confidentiality, the onset of the electronic information mode may renew congressional interest in extending by federal law modern privacy protections, known as fair information use stan-

dards, to sectors of the business community holding vast quantities of personally identifiable information. When the Privacy Act, applying fair information use standards to federal agencies, was enacted in 1974, it also mandated a temporary Privacy Protection Study Commission.[120] This panel explored various aspects of personal privacy with regard to information considerations and offered a number of recommendations for new policy in its final report in 1977.[121] Legislation was subsequently introduced to extend fair information use standards to personal records and files maintained by medical and insurance institutions, but intensive lobbying resulted in the defeat of the medical records proposal in the House of Representatives in 1980 and a consequential loss of enthusiasm for this kind of legislation. As increasing numbers of American businesses utilize electronic systems and formats to maintain personnel and client records containing personally identifiable information, old concerns about the accuracy, ready communication and sharing, and security of such material are rekindled, perhaps providing Congress an incentive to revisit the issue of statutory extension of fair information use standards.

## OVERVIEW

Clearly, during the past 200 years, Congress has repeatedly demonstrated its ability to use its legislative power in service to the informing function. In the early years of that history, Thomas Jefferson, a former President and a former legislator, penned the following comment in the summer of 1816.

> I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.[122]

Such a view might be attributed to many members of Congress during two centuries of legislating federal information policies. It probably also reflects the perspective of many members in the information age of today. Succeeding Congresses have established a legacy of information law and policy which contemporary legislators continue to nurture and refine. When the House Special Subcommittee on Government Information was created in 1955, only a handful of other congressional subcommittees had shown an interest in information policy. Today, a multiplicity of these panels is actively involved in information matters. Indeed, Congress well understands the significance of information for its own endeavors: knowledge *is* power. More important, in its legislative efforts, Congress has also largely kept sight of another cherished value: information *is* the currency of democracy.

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## *Notes*

1. Woodrow Wilson. *Congressional Government.* Cleveland: Meridian Books, 1956; originally published 1885, p. 198.

2. James A. Garfield. "A Century of Congress." *The Atlantic Monthly*, v. 40, July 1877, p. 60.

3. This material was further condensed by the author for his remarks at the sixth annual Forum on Federal Information Policies, sponsored by the Federal Library and Information Center Committee, March 22, 1989.

4. Max Farrand, ed. *The Records of the Federal Convention of 1787.* Vol. 2. New Haven: Yale University Press, 1937, p. 260.

5. *Ibid.*, Vol. 3, pp. 311, 326.

6. See, for example, 1 Stat. 68 (1789); 1 Stat. 443 (1789); 1 Stat. 519 (1797); 1 Stat. 724 (1799); 2 Stat. 302 (1804); 3 Stat. 145 (1814); 3 Stat. 439 (1818); 3 Stat. 576 (1820).

7. See 1 Stat. 168 (1789).

8. See, for example, 1 Stat 28 (1789); 1 Stat. 49 (1789); 1 Stat. 65 (1789). These and similar provisions were consolidated in the Revised Statutes of the United States (1878) at section 161, which is presently located in the United States Code at 5 U.S.C. 301.

9. See *Debates and Proceedings in the Congress of the United States [Annals of the Congress of the United States].* Vol. 9. Washington: Gales and Seaton, 1851, pp. 2426-2427, 2429-2437, 2445-2456.

10. See 3 Stat. 140 (1813).

11. See 13 Stat. 460 (1865).

12. See 17 Stat. 510 (1873).
13. See 9 Stat. 113 (1846).
14. 12 Stat. 117 (1860).
15. 28 Stat. 601 (1895).
16. 11 Stat. 379 (1859).
17. 15 Stat. 292 (1869).
18. 3 Stat. 140 (1813).
19. 11 Stat. 253 (1857).
20. 28 Stat. 610. Current authority for the depository library program may be found at 44 U.S.C. 1901-1915.
21. 33 Stat. 584 (1904).
22. 42 Stat. 541 (1922).
23. See 1 Stat. 109 (1790) on patenting and 1 Stat. 124 (1790) on copyright.
24. See 102 Stat. 2853 (1988).
25. 2 Stat. 55, 56 (1800).
26. 12 Stat. 387, 388 (1862).
27. 48 Stat. 1122 (1934).
28. 64 Stat. 823 (1950).
29. 92 Stat. 1641 (1978).
30. John A. Fairlie. "Administrative Legislation." *Michigan Law Review*, v. 18, January, 1920, p. 199.
31. Erwin N. Griswold. "Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation." *Harvard Law Review*, v. 48, December 1934, p. 199.
32. *United States* v. *Smith*, 292 U.S. 633 (1934), appeal dismissed on the motion of the appellant without consideration by the Court.
33. *Panama Refining Company* v. *Ryan*, 293 U.S. 388 (1935).
34. See George Creel. *How We Advertised America*. New York: Harper and Brothers, 1920, pp. 208-211; James R. Mock and Cedric Larson. *Words that Won the War*. Princeton: Princeton University Press, 1939, pp. 92-96; U.S. Committee on Public Information. *Complete Report of the Chairman of the Committee on Public Information, 1917, 1918, 1919*. Washington: U.S. Govt. Print. Off., 1920, pp. 63-67; Stephen L. Vaughn. *Holding Fast the Inner Lines*. Chapel Hill: University of North Carolina Press, 1980, pp. 197-200, 323-324.
35. 49 Stat. 500 (1935).
36. 50 Stat. 304 (1937).
37. See U.S. Department of Justice. Committee on Administrative Procedure. *Administrative Procedure in Government Agencies*. S. Doc. 8, 77th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1941.
38. 60 Stat. 237 (1946).

39. 60 Stat. 238.

40. See note 8.

41. 80 Stat. 250 (1966); 5 U.S.C. 552.

42. 88 Stat. 1896 (1974); 5 U.S.C. 552a.

43. 86 Stat. 770 (1972); 5 U.S.C. App.

44. 90 Stat. 1241 (1976); 5 U.S.C. 552b.

45. See Harold C. Relyea. "National Security and Information." *Government Information Quarterly*, v. 4, No. 1, 1987, pp. 11-28.

46. 11 Stat. 60 (1857).

47. See Richard C. Ehlke and Harold C. Relyea. "The Reagan Administration Order on Security Classification: A Critical Assessment." *Federal Bar News and Journal*, v. 30, February 1983, pp. 91-97.

48. 36 Stat. 1084 (1911); 40 Stat. 217 (1917).

49. E.O. 8381, 3 C.F.R. 1938-1943 Comp., pp. 634-635.

50. See 52 Stat. 3 (1938).

51. See *Congressional Record*, v. 88, October 17, 1942, p. 8311; *Ibid.*, v. 89, March 23, 1943, pp. 2393-2394.

52. See *Ibid.*, v. 89, March 23, 1943, pp. 2390-2408; *Ibid.*, March 31, 1943, pp. 2780-2799; *Ibid.*, April 2, 1943, pp. 2877, 2878-2895; for press comments, see *Ibid.*, Appendix, pp. A1312, A1688.

53. 60 Stat. 755 (1946); 42 U.S.C. 2161-2168.

54. 61 Stat. 495 (1947); 50 U.S.C. 403(d)(3).

55. See, for example, 63 Stat. 208, 211 (1949), 50 U.S.C. 403g; 96 Stat. 122 (1982), 50 U.S.C. 421-426; 98 Stat. 2209 (1984), 50 U.S.C. 431-432.

56. 66 Stat. 1 (1952); 66 Stat. 792, 805 (1952); 35 U.S.C. 181-188.

57. See Ehlke and Relyea, *op. cit.*

58. See U.S. Congress. House. Committee on Government Operations. *Executive Order on Security Classification*. Hearings, 97th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1982; U.S. Congress. House. Committee on Government Operations. *Security Classification Policy and Executive Order 12356*. H. Rept. 97-731, 97th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1982.

59. E.O. 12356, *Federal Register*, v. 47, April 6, 1982, pp. 14874-14884.

60. 38 Stat. 208, 212 (1913); 5 U.S.C. 3107.

61. U.S. Committee on Public Information, *op. cit.*, p. 8; Vaughn, *op. cit.*, pp. 245-246.

62. 55 Stat. 838 (1941).

63. U.S. Office of Censorship. *A Report on the Office of Censorship*. Washington: U.S. Govt. Print. Off., 1945, p. 10.

64. Allan M. Winkler. *The Politics of Propaganda*. New Haven: Yale University Press, 1978, pp. 21-24.

65. *Ibid.*, pp. 66-67.

66. *Ibid.*, pp. 70-71.

67. See *Federal Register*, v. 19, December 7, 1954, pp. 8045-8046; also see *Ibid.*, v. 20, September 28, 1955, p. 7233.

68. U.S. Department of Commerce. Office of the Secretary. Press release G-520. November 5, 1954. Washington, D.C.; also see James Russell Wiggins. *Freedom or Secrecy*. Revised edition. New York: Oxford University Press, 1964, pp. 102-103.

69. See U.S. Congress. House. Committee on Government Operations. *Availability of Information from Federal Departments and Agencies*. Hearings, 84th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1956, pp. 1123-1187, 1233-1286, 1447-1521, 1639-1711; U.S. Congress. House. Committee on Government Operations. *Availability of Information from Federal Departments and Agencies*. H. Rept. 2947, 84th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1956, p. 91.

70. See *Congressional Record*, v. 103, April 9, 1957, p. 5376; also see U.S. Congress. House. Committee on Government Operations. *Availability of Information from Federal Departments and Agencies*. H. Rept. 2578, 85th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1958, p. 13-14.

71. See *Federal Register*, v. 22, July 24, 1957, p. 5876.

72. 86 Stat. 489, 494 (1972); 22 U.S.C. 1461.

73. For the text of NSDD 84, see U.S. Congress. Senate. Committee on Governmental Affairs. *National Security Decision Directive 84*. Hearing, 98th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1984, pp. 85-86.

74. See 44 U.S.C. 1505.

75. See, generally, Harold C. Relyea. "The Coming of Secret Law." *Government Information Quarterly*, v. 5, No. 2, 1988, pp. 97-116.

76. See U.S. Congress. House. Permanent Select Committee on Intelligence. *Security Clearance Procedures in the Intelligence Agencies: Staff Report*. Committee print, 96th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1979; U.S. Congress. House. Permanent Select Committee on Intelligence. *Prepublication Review and Secrecy Agreements*. Hearings, 96th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1980; U.S. Congress. House. Committee on the Judiciary. *Prepublication Review and Secrecy Requirements Imposed upon Federal Employees*. Hearings, 96th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1980.

77. *Snepp* v. *United States*, 444 U.S. 507 (1980); also see Jonathan C. Medow. "The First Amendment and the Secrecy State: Snepp v. United States." *University of Pennsylvania Law Review*, v. 130, April

1982, pp. 775-844.

78. See U.S. Office of Technology Assessment. *Scientific Validity of Polygraph Testing: A Research Review and Evaluation.* A Technical Memorandum. Washington: U.S. Govt. Print. Off., 1983.

79. See, for example, U.S. Congress. Senate. Committee on Governmental Affairs. *National Security Decision Directive 84.* Hearing, 98th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on Government Operations. *Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use.* Hearing, 98th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on Government Operations. *The Administration's Initiatives to Expand Polygraph Use and Impose Lifelong Censorship on Thousands of Government Employees.* H. Rept. 98-578, 98th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on the Judiciary. *Presidential Directive on the Use of Polygraphs and Prepublication Review.* Hearings, 98th Congress, 1st and 2d Sessions. Washington: U.S. Govt. Print. Off., 1985.

80. *Congressional Record*, v. 129, July 15, 1983, pp. S10144-S10148 (daily edition).

81. *Ibid.*, July 26, 1983, p. H5685 (daily edition).

82. 97 Stat. 614-615 (1983).

83. *Congressional Record*, v. 129, October 20, 1983, pp. S14282-S14300 (daily edition).

84. 97 Stat. 1061 (1983).

85. H.R. 4681, *Congressional Record*, v. 130, January 3, 1984, p. E178 (daily edition).

86. See U.S. Congress. House. Committee on Post Office and Civil Service. *Federal Polygraph Limitation and Anti-Censorship Act of 1984.* Hearing, 98th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on Post Office and Civil Service. *Federal Polygraph Limitation and Anti-Censorship Act of 1984.* H. Rept. 98-961 Part 1, 98th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on Armed Services. *Hearings on H.R. 4681.* Hearing, 98th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1985; U.S. Congress. House. Committee on Armed Services. *Full Committee Consideration of H.R. 4681.* Hearing, 98th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on Armed Services. *Federal Polygraph Limitation and Anti-Censorship Act of 1984.* H. Rept. 98-961 Part 2, 98th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1984; U.S. Congress. House. Committee on

Judiciary. *Federal Polygraph Limitation and Anti-Censorship Act*. Hearing, 98th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1986.

87. See Leslie Maitland Werner. "Reagan to Relent on Secrecy Pledge." *New York Times*, February 15, 1984, p. A20; David Hoffman. "Reagan Shelves Requirement for Polygraph Tests." *Washington Post*, February 16, 1984, pp. A1, A12; Stuart Taylor, Jr. "Secrecy Proposal: Risks Weighed Against Gains." *New York Times*, February 20, 1984, p. A13.

88. See George Lardner, Jr. "McFarland Acts on Reagan's Orders: New Polygraphs, Censorship Shelved." *Washington Post*, March 22, 1984, p. A21; Stuart Taylor, Jr. "Delay Continued on Security Rule: White House Retreats Again from Its Censorship Plan." *New York Times*, March 24, 1984, p. 8.

89. See U.S. General Accounting Office. *Information and Personnel Security: Data on Employees Affected by Federal Security Programs*. GAO/NSIAD-86-189FS. Washington: U.S. Govt. Print. Off., 1986.

90. 101 Stat. 1329-432 (1987).

91. *National Federation of Federal Employees* v. *United States*, 688 F. Supp. 671 (D.D.C. 1988).

92. See U.S. Congress. House. Committee on Government Operations. *Congress and the Administration's Secrecy Pledges*. Hearing, 100th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1988.

93. To ensure that the constitutional issue would not become moot with the conclusion of fiscal year 1988, Congress continued the prohibition in the Treasury, Postal Service, and General Government Appropriation Act of the next fiscal year, 102 Stat. 1756 (1988).

94. *Griswold* v. *Connecticut*, 383 U.S. 479 (1965).

95. 5 U.S.C. 552 (b)(3).

96. 5 U.S.C. 552 (b)(6).

97. 15 U.S.C. 1681-1681t.

98. 5. U.S.C. 552a.

99. 20 U.S.C. 1232g.

100. 20 U.S.C. 1232h.

101. Apart from this type of law, Congress has sought to reinforce privacy protections in other areas. For example, with regard to the exercise of police powers, the Privacy Protection Act of 1980 (94 Stat. 1879; 42 U.S.C. 2000aa-2000aa-11) overturned the majority position of the Supreme Court in *Zurcher* v. *Stanford Daily* (436 U.S. 547 (1978)) and limited governmental search and seizure of documentary materials possessed by persons. More recently, Congress set limits on private sector use of polygraphs in the Employee Polygraph Protection

Act of 1988 (102 Stat. 646; 29 U.S.C. 2001-2009).

102. *Santa Clara County* v. *Southern Pacific Railroad Company*, 118 U.S. 394 (1885).

103. 18 U.S.C. 1905.

104. Daniel Gorham Clement. "The Right of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit." *Texas Law Review*, v. 55, March, 1977, pp. 607-613.

105. 13 Stat. 233 (1864).

106. 39 Stat. 756 (1916).

107. 52 Stat. 8 (1938).

108. U.S. Commission on Federal Paperwork. *Confidentiality and Privacy*. Washington: U.S. Govt. Print. Off., 1977, p. 26.

109. 5 U.S.C. 552 (b)(4).

110. 5 U.S.C. 552b(c)(4).

111. See U.S. Office of Technology Assessment. *Informing the Nation*. Washington: U.S. Govt. Print. Off., 1988; also see U.S. Congress. House. Committee on Government Operations. *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*. H. Rept. 99-560, 99th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1986; Association of Research Libraries. *Technology and U.S. Government Information Policies: Catalysts for New Partnerships*. Washington: Association of Research Libraries, 1987.

112. See Harold Edgar and Benno C. Schmidt, Jr. "*Curtiss-Wright* Comes Home: Executive Power and National Security Secrecy." *Harvard Civil Rights-Civil Liberties Law Review*, v. 21, Summer, 1986, pp. 349-408; Harold Hongju Koh. "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair." *Yale Law Journal*, v. 97, June, 1988, pp. 1255-1342; Saul Landau. *The Dangerous Doctrine*. Boulder: Westview Press, 1988; Jordan J. Paust. "Is the President Bound by the Supreme Law of the Land? — Foreign Affairs and National Security Reexamined." *Hastings Constitutional Law Quarterly*, v. 9, Summer, 1982, pp. 719-772.

113. Concomitant legal developments, such as the effects of the *Chadha* decision, 462 U.S. 919 (1983), are also relevant and in need of congressional consideration.

114. As defined in the Paperwork Reduction Reauthorization Act of 1986, information resources management means "the planning, budgeting, organizing, directing, training, promoting, controlling, and management activities associated with the burden, collection, creation, use, and dissemination of information by agencies, and includes the management of information and related resources such as automatic

data processing equipment." 100 Stat. 3341-336; 44 U.S.C. 3502(13).

115. *New York Times Company* v. *United States*, 403 U.S. 713, 729 (1971).

116. See, for example, National Academy of Sciences. *Scientific Communication and National Security*. Washington: National Academy Press, 1982; National Academy of Sciences. *Balancing the National Interest*. Washington: National Academy Press, 1987.

117. Current authorization, 102 Stat. 1362 (1988), for the Export Administration Act will expire on September 30, 1990.

118. The national security decision directives of the Reagan administration were given different names by prior presidential regimes, and are known as national security directives in the Bush administration. See David Hoffman. "President Scales Back National Security Council." *Washington Post*, February 3, 1989, p. A8.

119. See U.S. Congress. House. Committee on Government Operations. *Computer Security Act of 1987*. Hearings, 100th Congress, 1st Session. Washington: U.S. Govt. Print. Off., 1987, pp. 390-399, 430-454; U.S. Congress. House. Committee on Government Operations. *Presidential Directives and Records Accountability Act*. Hearing, 100th Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1989.

120. 88 Stat. 1905 (1974).

121. U.S. Privacy Protection Study Commission. *Personal Privacy in an Information Society*. Washington: U.S. Govt. Print. Off., 1977.

122. Letter to Samuel Kercheval, July 12, 1816, in Andrew A. Lipscomb and Albert Ellery Bergh, eds. *The Writings of Thomas Jefferson*. Vol 15. Washington: The Thomas Jefferson Memorial Association, 1904, pp. 40-41.

# *Scholarship and the Need for Information*

Robert M. Rosenzweig

My assigned topic on this program is "Scholarship and the Need for Information." I do not think I need to expound on the rather self-evident connection between the two parts of this topic. So let me deal with it by offering to stipulate, first, that the work of scholarship cannot proceed without a free flow of information and, second, that the quality of available information is severely attenuated if the enterprise of scholarship is weakened. I suspect that we have quite general agreement on those propositions, so I now propose to proceed to a consideration of threats to the free flow of information and to the enterprise of scholarship. Unfortunately, it is a large subject, with which I can deal only sketchily here, but let me try to provide at least an outline.

One part of the problem derives from the policies of universities, themselves, and is—in principle, at least—solvable by them. It has to do with restrictions on the communication of research results and processes that are accepted voluntarily as a cost of accepting research support from industry. The need of business to protect certain proprietary interests through limited delays in publication is understandable and can be accommodated without compromising important institutional values. However, the desire to win research funds from industry, and in some cases the pressure on institutions to have such links, can be so strong that inappropriate arrangements are accepted. That this has happened is beyond doubt. It is in the nature of such agreements that they are not widely known, so there is no ready way of finding out how serious a problem this is. It is, however, a new element on the information scene and is to be closely watched.

With respect to government, the picture is a good deal clearer. These last eight years have not been good ones for those who care about the free flow of information and ideas. That number should, of course, include all of those who care about the survival of democratic government, and it certainly should include all of those who care about the nation's intellectual life, its scientific and technological progress, and its universities. That should add up to a formidable group of people, and it does; but not

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one formidable enough to prevent serious setbacks in the government's approach to information policy, broadly defined.

That fact constitutes a special problem for universities. More than any other social institutions, universities have at the very core of their being a commitment to keeping open the channels of communication for ideas, information, opinion, truth, and even error. Thus, universities tend to do badly in a climate that is hostile to such things, even if, as in the McCarthy period, for example, the hostility is not directed primarily at them. In periods when error is deemed to have no rights, and it is, therefore, thought proper to stamp it out, then the expression of truth which is merely uncomfortable is bound to be stifled in the process.

That formulation of the problem is the more or less classical description of the nature and effect of the repression of unpopular ideas. The problem we have faced in the last eight years, however, is of a rather newer and different kind. It has little to do with ideas at all. Rather, it is rooted in the nature of the modern state, of the post-World-War-II international arena, and of the rise of science as a dominant force in both of those. It also has roots in a characteristic of government that is as old as government itself. Let me speak first to that last point as it affects universities today.

Sitting governments, even democratic governments, even democratic governments with long and strong traditions of protecting free speech, often require, and even more frequently believe they require, the ability to restrict the free flow of information. Governments always tend to be secretive about their own activities, sometimes for good reasons, more often in order to gain political advantage or to avoid threatened disadvantage. That is, or ought to be, an elementary civics lesson. Serious trouble begins when circumstances seem so threatening—and the definition of threat can be very broad—that it seems necessary to reach outside the processes of government, itself, to restrict the communication of those who are not of government, but are somehow connected to it. The reach may be to those who once were part of government, to those who receive funds from the government, to those who report on government. The greater the threat as it is perceived by those in government, the longer their reach is likely to be. That is a more contemporary civics lesson that ought, also, to be incorporated in the textbooks.

Until quite recently, such lessons were, literally, of only academic interest to university people. The reason is that until quite recently—the beginning of World War II, to be precise—universities and government had very little to do with one another. The average university president could wake up in the morning, put in a full day's work, and go to bed at

night without once being troubled by thoughts of what the national government was doing that might affect his institution. It is a rare day when that can be said about any modern university president. The major universities of this nation have become deeply enmeshed with the federal government, in an embrace of mutual dependency that makes senior government officials as important as any wealthy donor once was and that makes government policy an essential part of institutional calculations on a broad range of topics.

Information policy has become one of those topics.[1] It has become, and it remains, an important preoccupation of both government and universities, and it is an important source of tension between them. As I suggested earlier, this tension is focused, for a change, not in the area of ideas, but in the area in which the government's interests and the universities' activities most pointedly intersect, namely, research in science and advanced technology. The core of the problem lay in the belief of key officials of the [Reagan] administration that the practice of open dissemination of research results through publications, conferences, and exchange of technical personnel was harmful to the national security because it gave our adversaries the advantage of work that they could not do themselves. Vannevar Bush foresaw both the problem and the solution in his landmark book, *Science: The Endless Frontier*. He said, "[A] sounder foundation for our national security rests in a broad dissemination of scientific knowledge upon which further advances can more readily be made than in a policy of restriction which would impede our further advances in the hope that our potential enemies will not catch up with us."[2]

There is neither time nor reason here to recount the battles that have been fought on that ground in recent years. Through the application of the Export Control Act, and through the crafting of several national security directives, the Reagan administration sought to restrict the communication of research results that it deemed threatening to the national security. Their principle ground was that in the modern world the transmission of knowledge across borders can be every bit as damaging as the transport of military hardware. Moreover, according to the administration's approach, even information that is innocent by itself may need to be restricted if, in combination with other innocent pieces of information, it may be used in damaging ways. Thus, the range of research results subject to control went far beyond what was merely classified. It was, indeed, bounded only by the imagination of the controllers. Suffice it to say here that there is certainly truth to the argument, but there is very little validity to the solution they tried to impose.

Resistance to these efforts was partially successful, helped immeasurably by the fact that industry was as upset about the restrictions on them through the Export Control Act as were universities, and so it was possible to draw the attention of the Congress to the problem. I should also say that the administration was not monolithic on this issue, and much useful support came from officials whose views disagreed with the prevailing orthodoxy.

Let me mention several other problem areas.

• During the Reagan years there was at least a continuation, if not an increase, in efforts by individual agencies to prescreen research papers to determine if any part of them should be withheld. Here, too, classification was not the issue. Indeed, even the Department of Housing and Urban Development (HUD) has insisted on a six-month publication delay and then the right to require "corrections" of methodology, data, or analysis. While of great value to the nation, HUD-sponsored research seems unlikely to contain material that is important to national security. It is reasonable to suspect that such requirements are motivated by a wish to avoid the publication of research that may be contrary to the prevailing policy or might otherwise embarrass the department. Harvard refused a HUD contract when the agency proved unwilling to eliminate that contract clause.

• The Reagan years saw a reversal of a long, slow movement to tighten the rules of classification and to release more classified information.

• The FBI's Library Awareness Program—and isn't that a wonderfully Orwellian name for a program that consists of snooping on borrowers—showed yet again that no suspicion is too remote to serve as a pretext for questionable state action.

• Finally, on this brief list, there was the ill-conceived [national security decision directive] NSDD 84, published in 1983. Among its other provisions, NSDD 84 would have required more than 120,000 government employees to sign agreements requiring prepublication review of anything they proposed to publish after leaving government. For many reasons that was of great concern to universities, not the least being that many of the people covered would have come from university faculties and be planning to return to them, so that the effect on research and teaching was potentially large.

That directive was rescinded after strong congressional protests, but it should be noted that, using existing authority, by the end of 1985, prescreening agreements had been signed by 240,000 individuals. In 1984, 21,718 manuscripts were previewed, and another 22,820 in 1985. So that you may sleep soundly tonight knowing that the Republic is safe

from the exposures of its former trusted officials, Shattuck and Spence report that out of all that material, 15 unauthorized disclosures were found.

It is too soon to know how the Bush administration will treat these issues. Bureaucracies are, by their nature, conservative. Left to their own devices, they are likely to choose safety, and safety in the information area leads to restriction on the superficially sound grounds that information that is not released doesn't cause trouble. When the bureaucracy is led, as it was in many key places in the Reagan administration, by second- and third-level political appointees who believe as a matter of doctrine in that principle, then there is real trouble afoot. We do not know who those people will be in the new administration, nor have there been policy directives from above.

These are matters of great concern to the intellectual community. The object of contemporary policy may be science and technology, but the attitudes that have propelled policy in recent years, and the apparatus that has been established to implement policy, ought to concern us all. Scholarship and the institutions of scholarship do best when all the channels are open. We should work toward that goal.

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[1] For much of the information that follows from this point, I am indebted to John Shattuck and Muriel Morisey Spence, whose work in this field has saved all of us who are interested in it untold hours of hard labor. Particularly useful is their *Government Information Controls: Implications for Scholarship, Science and Technology*, published by AAU in 1988.

[2] Quoted in Shattuck and Spence, *op. cit.*, p.2.

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